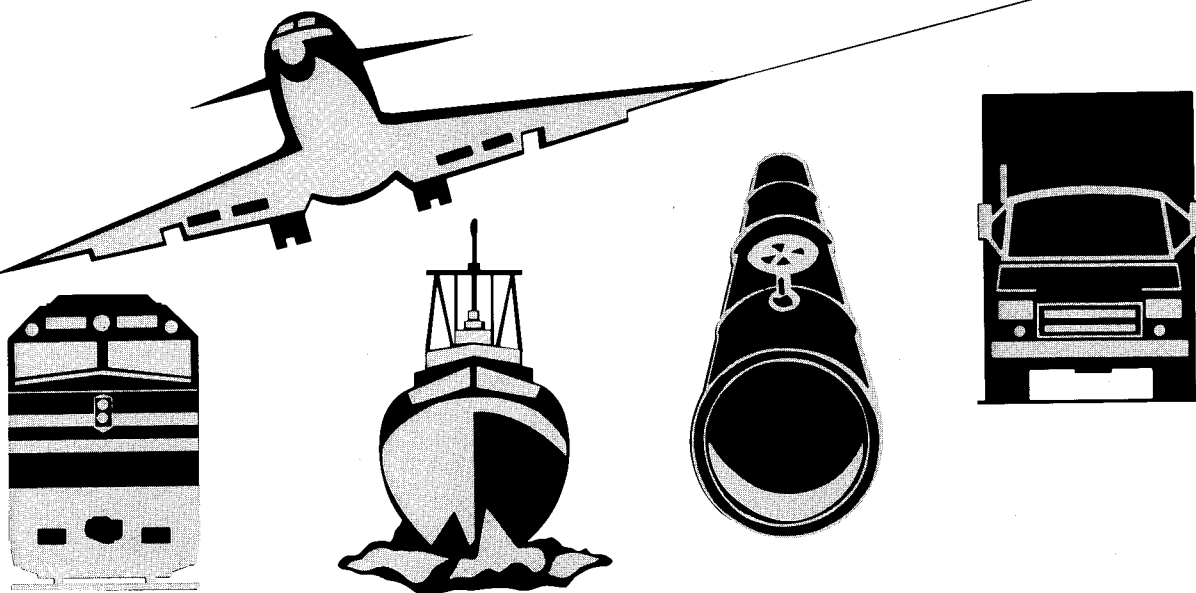


NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C. 20594

TRANSPORTATION INITIAL DECISIONS AND ORDERS AND BOARD OPINIONS AND ORDERS

**ADOPTED AND ISSUED DURING THE MONTH
OF OCTOBER 1999**



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OPINIONS AND ORDERS
FOR THE MONTH OF OCTOBER 1999

SERVED: October 5, 1999

NTSB Order No. EA-4792

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)
on the 5th day of October, 1999

JANE F. GARVEY,
Administrator,
Federal Aviation Administration,

Complainant,

v.

CLEO KING,

Respondent.

Docket SE-15194

ORDER DISMISSING APPEAL

On February 2, 1999, respondent filed a timely notice of appeal from the oral initial decision Administrative Law Judge William R. Mullins rendered in this case on January 28, 1999.¹ However, respondent did not file an appeal brief by May 10, the date to which his original deadline (March 19) for the filing had been extended, as required by section 821.48(a) of the Board's Rules of Practice, 49 CFR Part 821.²


¹The law judge upheld an order of the Administrator suspending any and all airman certificates held by respondent, including Commercial Pilot Certificate No. 2162007, for a period of 90 days, for his alleged violations of sections 91.13(a) and (b), 91.111(a), and 91.113(b) of the Federal Aviation Regulations, 14 CFR Part 91.

²Section 821.48(a) provides as follows:

In the absence of good cause to excuse the failure to file a timely appeal brief, respondent's appeal must be dismissed. See, e.g., Administrator v. Hooper, 6 NTSB 559 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is dismissed.


Ronald S. Battocchi
General Counsel

(..continued)

§ 821.48 Briefs and oral argument.

(a) *Appeal briefs.* Each appeal must be perfected within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief.

NTSB Order No. EA-4793

Issued under delegated authority (49 C.F.R. 800.24)
on the 7th day of October, 1999

Dockets SE-15513
and SE-15514

The respondents have moved to dismiss the appeal filed by the Administrator in this proceeding because it was not perfected by the filing of a timely appeal brief, as required by Section 821.48(a) of the Board's Rules of Practice (49 CFR Part 821).¹

§ 821.48 (a) Briefs and oral argument.

(a) Appeal briefs. Each appeal must be perfected within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief.

We will grant the motion, to which the Administrator filed no response.

The record establishes that the Administrator filed a timely notice of appeal from the oral initial decision the law judge rendered in this case on April 15, 1999,² but she did not file an appeal brief within 50 days after that date; that is, by June 4, and she has not to date filed an appeal brief.

In the absence of good cause to excuse the Administrator's failure to perfect her appeal by filing a timely appeal brief, dismissal of her appeal is required by Board precedent. See Administrator v. Hooper, 6 NTSB 559 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondents' motion to dismiss is granted; and
2. The Administrator's appeal is dismissed.


Ronald S. Battocchi
General Counsel

²The law judge dismissed orders of the Administrator suspending respondents' airman certificates for a period of 45 days for their alleged violations of sections 91.13(a) and, as to respondent Willroth, section 91.123(b), and, as to respondent Droogleever, section 91.123(a) of the Federal Aviation Regulations, 14 CFR Part 91.

NTSB Order No. EA-4795

Issued under delegated authority (49 C.F.R. 800.24)
on the 8th day of October, 1999

Docket SE-15533

The Administrator has moved to dismiss the appeal filed by the respondent in this proceeding because it was not perfected by the filing of a timely appeal brief, as required by Section 821.48(a) of the Board's Rules of Practice (49 CFR Part 821).¹

(a) Appeal briefs. Each appeal must be perfected within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief.

We will grant the motion, to which respondent filed no response.

The record establishes that respondent filed a timely notice of appeal from the oral initial decision the law judge rendered on June 10, 1999,² but he did not file an appeal brief within 50 days after that date; that is, by July 30, and he has not to date filed an appeal brief.

In the absence of good cause to excuse respondent's failure to perfect his appeal by filing a timely appeal brief, dismissal of his appeal is required by Board precedent. See Administrator v. Hooper, 6 NTSB 559 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to dismiss is granted; and
2. The respondent's appeal is dismissed.


Ronald S. Battocchi
General Counsel

²The law judge upheld an order of the Administrator suspending any airman certificate held by respondent, including Private Pilot Certificate No. 227252878, for a period of 150 days, for his alleged violations of sections 91.119(a) and (b), and 91.13(a) of the Federal Aviation Regulations, 14 CFR Part 91.

SERVED: October 8, 1999

NTSB Order No. EA-4794

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)
on the 8th day of October, 1999

JANE F. GARVEY,
Administrator,
Federal Aviation Administration,

Complainant,

v.

TROY ALAN NENSTIEL,

Respondent.

Docket SE-15479

ORDER DISMISSING APPEAL

The Administrator has moved to dismiss the appeal filed by the respondent in this proceeding because it was not perfected by the filing of a timely appeal brief, as required by Section 821.48(a) of the Board's Rules of Practice (49 CFR Part 821).¹

¹Section 821.48(a) provides as follows:

§ 821.48(a) Briefs and oral argument.

(a) Appeal briefs. Each appeal must be perfected within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief.


We will grant the motion, to which respondent filed no response.

The record establishes that respondent filed a timely notice of appeal from the oral initial decision the law judge rendered on May 5, 1999,² but he did not file an appeal brief within 50 days after that date; that is, by June 24, and he has not to date filed an appeal brief.

In the absence of good cause to excuse respondent's failure to perfect his appeal by filing a timely appeal brief, dismissal of his appeal is required by Board precedent. See Administrator v. Hooper, 6 NTSB 559 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to dismiss is granted; and
2. The respondent's appeal is dismissed.


Ronald S. Battocchi
General Counsel

²The law judge affirmed an order of the Administrator revoking any airman pilot certificate held by respondent, including Private Pilot Certificate and Flight Instructor Certificate No. 530947858, for his alleged violations of sections 91.103(a), 91.13(a), 91.7(a) and (b), and 91.9(a) of the Federal Aviation Regulations, 14 CFR Part 91.

SERVED: October 13, 1999

NTSB Order No. EA-4796

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)
on the 13th day of October, 1999

JANE F. GARVEY,
Administrator,
Federal Aviation Administration,

Complainant,

v.

JAMES LEON HODGE,

Respondent.

Docket SE-15615

ORDER DISMISSING APPEAL

On July 19, 1999, respondent, by counsel, filed a timely notice of appeal from the order Administrative Law Judge William E. Fowler, Jr., served in this case on July 9, 1999.¹ However, respondent did not file an appeal brief by August 9, as required by section 821.48(a) of the Board's Rules of Practice, 49 CFR Part 821.²

¹The law judge's order granted a motion by the Administrator for dismissal of respondent's appeal from an emergency revocation order issued by the Administrator as untimely. Respondent had previously waived application of the Board's expedited procedures to this proceeding, which alleged violations related to respondent's use of his mechanic certificate while it was under suspension.

²Section 821.48(a) provides as follows:

In the absence of good cause to excuse the failure to file a timely appeal brief, respondent's appeal must be dismissed. See, e.g., Administrator v. Hooper, 6 NTSB 559 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is dismissed.


Ronald S. Battocchi
General Counsel

(..continued)

§ 821.48 Briefs and oral argument.

(a) *Appeal briefs.* Each appeal must be perfected within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief.

SERVED: October 26, 1999

NTSB Order No. EA-4798

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)
on the 26th day of October, 1999

JANE F. GARVEY,
Administrator,
Federal Aviation Administration,

Complainant,

v.

JOHN JEROME BASCO and
DAVID R. KOCH,

Respondents.

Dockets SE-15000
and SE-15001

ORDER GRANTING STAY

Respondents, by counsel, have requested a stay of NTSB Order EA-4788, served September 15, 1999, pending disposition of a petition for review of that order in the United States Court of Appeals pursuant to Section 1006 of the Federal Aviation Act (49 U.S.C. 14110) and the NTSB Rules (49 C.F.R. 821.64).¹ The Administrator does not oppose the request. It appears that good cause exists for granting the stay.

ACCORDINGLY, IT IS ORDERED THAT:

The effective date of NTSB Order EA-4788 is stayed until the expiration of the 60-day period within which a petition for review may be filed with the Court of Appeals; however, if such a petition is filed, the stay will continue in effect until the court enters judgment on the petition.


for Ronald S. Battocchi
General Counsel

¹Board Order EA-4788 affirmed a 45-day suspension of each respondent's ATP certificate.

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NTSB Order No. EA-4797

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of October, 1999

Docket 254-EAJA-SE-14331

The Administrator issued an order suspending respondent's
airman certificates, including his airline transport pilot
("ATP") certificate, on December 21, 1995, alleging that

7175

respondent operated N900NC, a DeHavilland DHC-4A Caribou, while it was in disrepair and had unauthorized supplemental oil and fuel tank systems.² The Administrator's allegations were based upon information relayed by Canadian authorities who inspected N900NC one day after respondent made an emergency landing in Quebec while ferrying the aircraft from the United States to Zaire. Applicant appealed the Administrator's order to the law judge, who, after a hearing, dismissed the complaint for lack of sufficient evidence. Upon the Administrator's appeal, the Board affirmed the dismissal. Administrator v. Livingston, NTSB Order No. EA-4597 (1997).

Applicant filed the instant EAJA application on October 28, 1997. Although the law judge concluded that "[a]pplicant's legal fees and expenses . . . were paid by his former employer," International Jet Charter, Inc. ("IJC"), the company, apparently, on whose behalf applicant was ferrying N900NC to Zaire, the law judge nonetheless concluded that applicant was entitled to an EAJA recovery. Initial Decision ("ID") at 14. Because applicant's eligibility to recover EAJA fees and expenses under the circumstances of this case is a threshold issue,³ we turn to

² The attached initial decision recites the details of the Administrator's complaint.

³ See 5 U.S.C. §§ 504(a)(1); 504(b)(1) (indicating that a party should recover under EAJA only if that party (1) prevailed in the underlying proceeding, (2) meets certain net worth requirements, and (3) incurred the sought fees and expenses in connection with the underlying proceeding; if all those criteria are met, then an adjudicating agency is to make an award, unless the position of the agency which brought the case is found to have been

(continued...)

this issue first.

In order to be eligible to recover under EAJA, a "party"⁴ must, among other things, have "incurred"⁵ the fees and expenses that are sought.⁶ In the instant case, it appears that applicant's litigation costs were borne by IJC. Applicant's EAJA application includes an October 27, 1997, letter to applicant's counsel from an IJC representative listing "expenses paid by IJC related to the FAA v. Larry Livingston litigation" wherein the author also states, "I am making the assumption that you will include your legal charges . . . in the claim you file." The EAJA application also includes a submittal by applicant for

(...continued)

substantially justified or other factors would make an award unjust). The law judge concluded that the Administrator was not substantially justified in bringing her charges against applicant, and ordered the Administrator to pay an award of \$29,994.33.

⁴ Contrary to applicant's assertion that IJC "could easily qualify to make the application here," IJC would not be permitted under EAJA to apply to recover costs it expended on applicant's behalf. Only a party may seek an award, and IJC was not a party to the underlying litigation. See 5 U.S.C. §§ 504(a); 504(b)(1)(B); 551(3) (defining a "party").

⁵ "Incurred" is not defined in either the statute or its legislative history. However, "incur" is generally defined as follows:

To have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively. To become liable or subject to, to bring down upon oneself, as to incur debt, danger, displeasure and penalty, and to become through one's own action liable or subject to.

Black's Law Dictionary 768 (6TH ed. 1990) (citations omitted).

⁶ See footnote 3, supra.

reimbursement by IJC of litigation expenses, and several of applicant's counsel's meal receipts included in the application have the handwritten notation "International Jet Charter" on them. Finally, one of applicant's counsel's billing statements refers to a consultation with IJC directors regarding a settlement check sent to the FAA.⁷ Thus we are confronted with the issue of whether applicant "incurred" these costs.⁸

Applicant argues that IJC merely "advanced" the legal fees and expenses and he now "owes [it] back." To us, this claim implies that respondent would owe the monies regardless of the outcome of the litigation for which IJC allegedly advanced its monies, but there is no evidence of any such obligation or agreement. At most, applicant's assertions indicate, as the law judge found, "at least an implied arrangement between [a]pplicant and IJC to the effect that, if [a]pplicant recovers fees and expenses under EAJA, he will reimburse IJC for the attorney fees

⁷ We also note that applicant did not appeal the law judge's finding that his litigation costs were, in fact, paid for by IJC and, indeed, in a response to a motion now pending before us, applicant's counsel asserts that "IJC paid those fees and costs charged to the respondent." Respondent's Opposition to Administrator's Motion to Strike at 1.

⁸ The Aircraft Owners and Pilots Association ("AOPA") has filed a motion, opposed by the Administrator, seeking leave to submit an *amicus curiae* brief in support of applicant's EAJA recovery. In accordance with our regulations, AOPA conditionally filed their brief pending our ruling on their motion. AOPA's submission satisfies the requirements of our regulations and their brief is accepted. 14 C.F.R. § 821.9(b). Although our opinion and order speaks to some of the general arguments AOPA raises in its brief, our opinion and order here is not intended to address, and does not decide, the issues inherent in AOPA's concerns about EAJA recoveries by member-pilots enrolled in its Legal Services Plan.

and expenses which it paid on his behalf in defending this action." ID at 14.⁹

It was this assumed "contingency," apparently, that prompted the law judge to conclude that applicant was eligible to recover under EAJA in light of our opinion in Administrator v. Scott, NTSB Order No. EA-4472 (1996). In Scott we addressed the question of whether there was a policy-based or legal proscription to granting EAJA fees and expenses in the context of contingent fee arrangements. In general terms, under a contingency arrangement the legal representative will be paid from, and only if there is, any recovery under EAJA. In deciding Scott, we reviewed federal case law that has crafted a "fee shifting" exception to the literal meaning of "incurred" in order to carry out "[t]he central objective of the EAJA . . . [which] was to encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expenses." Spencer v. NLRB, 712 F.2d 539, 549-50 (D.C. Cir. 1983), as cited in SEC v. Comserv Corp., 908 F.2d 1407, 1415 at

⁹ Our view here is consistent with applicant's undocumented claim that he now "owes" IJC money that it "advanced," for he apparently uses such phrases with the view that he is entitled to recover under EAJA and, presumably, that it is permissible to obtain such fees for the sole purpose of reimbursing a third party who funded his successful litigation. The distinction is important, however, for we assume, without deciding, that an applicant who truly had his litigation costs advanced -- that is, the money would be owed even where the litigation proves to be completely unsuccessful -- would be deemed to have incurred such costs.

FN 10 (8th Cir. 1990). Essentially, this fee shifting is a policy-based legal construction that deems a prevailing party who was represented pursuant to a contingency fee arrangement to have incurred the associated legal costs. This notion drove our conclusion in Scott that contingency fee arrangements did not bar an EAJA recovery. Scott at 5-9.

We find nothing which indicates applicant is entitled to recover under EAJA. Applicant's attorney will not be deprived of payment, regardless of whether applicant recovers under EAJA. A policy intended to encourage attorneys to represent persons in otherwise "unprofitable" cases therefore is not undermined by a disapproval of fees here. The Comserv case is on point. The Securities and Exchange Commission ("SEC") brought an action against Comserv and several of its officers. After the SEC's action against a particular officer was unsuccessful, the officer sought to recover fees and expenses under an EAJA statute. The SEC objected on the grounds that, among other things, the officer had not incurred any litigation costs since Comserv, which carried litigation insurance, had indemnified the officer for his litigation costs. Comserv, 908 F.2d 1407 at 1409-1410. The court agreed with the SEC. Id. at 1415.¹⁰

The essence of the Comserv court's opinion is its conclusion that the officer did not "requir[e] the assistance of a federal

¹⁰ Although the Comserv court applied a different statute, the relevant language is the same. 908 F.2d 1407 at 1410 (quoting 28 U.S.C. § 2412 which, like 5 U.S.C. § 504, is a codification of EAJA).

fee-shifting statute to overcome the deterrent of attorneys' fees." Id. at 1414. In the instant case, IJC funded applicant's defense from the initiation of litigation. Applicant's counsel's billing records even indicate that IJC, not applicant, contacted applicant's counsel about the case and secured his representation of applicant. Thus, like the officer in Comserv, applicant, by virtue of his arrangement with IJC, was "from the inception of the underlying [litigation], . . . able to pursue his defense . . . secure in the knowledge that he would incur no legal liability for attorneys' fees." Comserv at 1414. We agree with the Comserv court that "[t]o hold he 'incurred' such fees is to turn the word upside down." Id. at 1414-1415.¹¹

Respondent has not "incurred" fees and expenses within the meaning of the statute and he therefore may not recover them through EAJA.

¹¹ Because we conclude that applicant is not eligible for an award of fees and expenses under EAJA, we need not reach the issue of whether the Administrator was substantially justified in maintaining her action. See footnote 3, supra. Nonetheless, we note that the law judge's finding that the Administrator was not substantially justified in bringing her action is difficult to square with precedent holding that the Administrator is substantially justified in proceeding to a hearing "when key factual issues hinge on witness credibility." Caruso v. Administrator, NTSB Order No. EA-4165 at 9 (1994). The law judge's dismissal of at least some, if not all, of the charges against applicant hinged upon his acceptance of applicant's testimony.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted; and
2. The initial decision awarding applicant fees and expenses is reversed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

GC-1

Served: March 20, 1998

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

Application of

LARRY DEAN LIVINGSTON,

Docket No. 254-EAJA-SE-14331

for fees and expenses under the
Equal Access to Justice Act.

**ORDER GRANTING, IN PART, FEES AND EXPENSES UNDER
THE EQUAL ACCESS TO JUSTICE ACT**

Service: Michael J. Pangia, Esq.
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Larry Dean Livingston
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Daleville, Alabama 36322

(BY CERTIFIED MAIL)

(BOTH BY CERTIFIED MAIL)

William A. Pope, II, Administrative Law Judge: On October 28, 1997, the Applicant, Larry Dean Livingston, filed an "Application for Award of Attorney Fees and Expenses" under the Equal Access to Justice Act ("EAJA"),¹ seeking an award against the Administrator of the Federal Aviation Administration ("FAA") in the total amount of \$55,421.94.² The Administrator subsequently submitted an answer to the Application on December 5, 1997. Thereafter, the Applicant submitted a reply to the Administrator's answer on December 11, 1997; the Administrator filed a supplemental response to that reply on December 18, 1997; and the Applicant filed a reply thereto on January 5, 1998. No further submissions having been received from the parties, the application is now ready for decision.

The application and supporting documents filed by the Applicant establish that he meets the eligibility requirements set out in the Act and the Board's Rules, and the application is both timely and procedurally correct.

¹ This is a proceeding filed under the EAJA, 5 U.S.C. § 504, and the Board's Rules implementing that Act, found at 49 C.F.R. Part 826.

² This amount includes the initial claim of \$54,714.09, plus 5½ hours of attorney time (at \$128.70 per hour, for a total of \$707.85) spent in preparing the EAJA claim, resulting in a total claim of \$55,421.94.

This case arose from the Applicant's appeal of an Order of Suspension, issued on December 21, 1995, and filed as the complaint in the underlying proceeding on December 28, 1995, in which the Administrator ordered the suspension of any and all airman certificates held by the Applicant, including his Airline Transport Pilot Certificate No. 155880, for 20 days, for alleged violations of §§ 91.7, 91.13(a), 91.407(a)(2) and 91.203(c) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.).³ The hearing in that proceeding took place in Richmond, Virginia, on May 22, 23 and 24, 1996, and June 20 and 21, 1996. A Written Initial Decision and Order, dismissing the Administrator's Order of Suspension, was issued on July 12, 1996.

The Administrator filed a timely appeal from the Written Initial Decision and Order, and on October 1, 1996, the full Board denied the Administrator's appeal, and affirmed the initial decision.

Based on this sequence of events, the Applicant is clearly a prevailing party within the meaning of the EAJA.

³ The Administrator's Order of Suspension, which, pursuant to § 821.31(a) of the Board's Rules, serves as the Complaint, states that:

1. You are the holder of Airline Transport Pilot Certificate No. 155880.
 2. On or about October 18, 1994, you were the pilot-in-command of a DeHavilland Caribou DHC-4A, identification number N900C (sic), in the vicinity of Aeroport De Kuujuaq, Quebec, Canada.
 3. The above-described aircraft made an emergency landing at Aeroport De Kuujuaq, Quebec, Canada.
 4. On or about October 19, 1994, during an inspection of the above described-aircraft the following was revealed.
 - a) The aircraft had a bad fuel leak on underside of L/H wing approximately twenty-four (24) inches outboard of engine (approximately 2-3 drops of fuel per second.)
 - b) The aircraft had oil leaks on both engines, cowlings, landing gear, landing gear doors, and aft of landing gears were covered with black oil and some fresh clean oil.
 - c) The aircraft had no proof of FAA/DER approval on 500 U.S. gallon steel fuel tank installation in aircraft cabin.
 - d) The aircraft had no proof of FAA/DER approval for 4-44 U.S. gallon oil drums to transfer oil to engines in flight. These drums were secured by one cargo strap.
 5. By reason of the above, you operated the above-described aircraft after it had undergone maintenance, preventive maintenance, rebuilding or alteration when:
 - a) The aircraft had not been properly approved for return to service, and
 - b) The maintenance record entry required by Section 43.9 or Section 43.11, as applicable, had not been made.
 6. By reason of the above, you operated an aircraft when it was in an unairworthy condition.
 7. By reason of the above, you operated an aircraft in a careless or reckless manner so as to endanger the life or property of another.
- By reason of the foregoing, you violated the following section(s) of the Federal Aviation Regulations:
1. Section 91.71 in that you operated an aircraft in an unairworthy condition.
 2. Section 91.13(a), in that you operated an aircraft in a careless or reckless manner so as to endanger the life or property of another.
 3. Section 407(a)(1), in that you operated an aircraft without proper approval for return to service after it had undergone maintenance, preventive maintenance, rebuilding or alteration.
 4. Section 91.407(a)(2), in that you operated an aircraft without having the proper maintenance record entries made after it had undergone maintenance, preventive maintenance, rebuilding or alteration.
 5. Section 91.203(c), which states that no person may operate an aircraft with a fuel tank installed within the passenger compartment or a baggage compartment unless the installation was accomplished pursuant to part 43 of this chapter, and a copy of FAA Form 337 authorizing that installation is on board the aircraft.

II

The EAJA, 5 U.S.C. § 504, *et seq.*, requires the Government to pay to the prevailing party certain attorney fees and costs unless the government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust. 5 U.S.C. § 504(a)(1). The Administrator has the burden of demonstrating substantial justification. *Application of Wendler*, 4 NTSB 718, 720 (1983). For the Administrator's position to be substantially justified, it must be reasonable in both fact and law, i.e., the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory. *Application of U.S. Jet, Inc.*, NTSB Order EA-3817 at 2 (1993); *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *U.S. v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1487 (10th Cir. 1984). Reasonableness in fact and law should be judged as a whole, including whether "there was sufficient reliable evidence initially to prosecute the matter," at each succeeding step of the proceeding. *Application of U.S. Jet, Inc.*, *supra*, at 2; *Application of Phillips*, 7 NTSB 167, 168 (1990). But the Board has also made it clear that the substantial justification test is less demanding than the Administrator's burden of proof, and it is not whether the government wins or loses that determines whether its position was substantially justified. *Application of U.S. Jet, Inc.*, *supra*, at 3. See also *Federal Election Commission v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986).

In *Application of Petersen*, NTSB Order EA-4490 at 6 (1996), the Board, citing *Application of Caruso*, NTSB Order EA-4615 at 9 (1994), opined that "[w]hen key factual issues hinge on witness credibility, the Administrator is substantially justified – absent some additional dispositive evidence – in proceeding to hearing where credibility judgments can be made on those issues." Citing *Application of Conahan*, NTSB Order EA-4276 (1994); and *Application of Martin*, NTSB Order EA-4280 (1994), the Board further stated that substantial justification cannot be found to have been lacking for the Administrator's position simply because the law judge discredited the testimony of a particular witness.⁴

In *Application of Scott*, NTSB Order EA-4274 (1994), a case involving an emergency defense to landing an overweight aircraft, the Board held that the Administrator was obliged not to pursue the matter if the emergency defense was reasonable. There, the Board said that "[u]nder EAJA, the Administrator has a duty to discontinue his investigation or prosecution at any time he knows or should know that his case is not reasonable in fact or law, or be liable for EAJA fees for any further expenses applicant incurs. The Administrator was required to analyze, as more information became available to him, whether continued investigation and prosecution was reasonable." (NTSB Order EA-4274 at 5 (emphasis original).)

III

The Applicant contends that he is entitled to an award of attorney fees and expenses herein because the FAA was not substantially justified in law and in fact in bringing this action. In this regard, he asserts that the hearing essentially turned into a probing or investigatory process, which should have

⁴ NTSB Order EA-4490 at 6-7.

been accomplished prior to the Administrator's decision to bring this action, and that the Administrator proceeded on the basis of partial information, without interviewing him, the mechanic on board the subject aircraft (N900NC), and other persons involved with that aircraft in Battle Creek, Michigan. The Applicant contends that, if a proper investigation had been conducted, the Administrator would have known that there were no witnesses, photographs, or other evidence, including aircraft records, to contradict his testimony, or that of anyone else associated with the flight, that supplemental oil and fuel systems were not connected to the aircraft in flight. The Applicant also notes out that the Administrator first theorized at the hearing – and not in the complaint – that the carrying of fuel in the supplemental tank was hazardous, and that the batteries in the cargo compartment were improperly stowed.

The Administrator opposes an award of attorney fees and expenses under the EAJA herein because, she avers: (1) there was substantial justification for her to pursue the underlying certificate action; (2) there exist special circumstances which would make an EAJA award in this matter unjust; and (3) the Applicant himself did not incur any legal costs in connection with this case. In addition, the Administrator contends that the attorney fees and expenses claimed by the Applicant in this action are excessive.

The Administrator does not contest that the Applicant was the prevailing party in the underlying proceeding, as defined by the Act, nor does she challenge the Applicant's net worth. However, she points out that the Applicant did not personally incur the legal fees and expenses for which he claims reimbursement herein – as those expenses were paid by International Jet Charter, Inc. ("IJC"), which was affiliated with Africa Air Corporation ("Africa Air"), the owner of the aircraft – and avers that he should not, therefore, be permitted to recover such fees and expenses under the EAJA. Further, the Administrator contends that representatives of Africa Air unconditionally admitted during the investigation that violations had occurred due to a failure to document and obtain approval for installation of an auxiliary fuel system, and that this admission removed the need for further investigation by the FAA. According to the Administrator, the fact that Africa Air and the Applicant decided to challenge the Administrator after those admissions were made constitutes a special circumstance which would make an award of EAJA fees here unjust, even if she were not otherwise substantially justified in bringing the underlying action.

On the issue of substantial justification, the Administrator maintains that there existed a reasonable basis in law for the legal theory she pursued in the underlying action, and that the facts alleged reasonably supported that legal theory. In this regard, she notes that her witnesses, Ian Stewart and Murry Caldwell, testified that they saw fuel and oil leaks from the aircraft's engines and fuel tanks after it landed at Kuujuaq, Quebec, Canada, and that, inside the cargo compartment, they saw a system designed to carry extra oil and fuel with the hoses and pumps required to transfer the fuel and oil in flight. She further notes that she presented evidence that a supplemental fuel system extending the aircraft's range would have significantly contributed to the safety of its operation, particularly in connection with its crossing over the North Atlantic Ocean. These facts, contends the Administrator, supported a reasonable inference that the configuration in question was intended as an auxiliary fuel system.

The Administrator maintains that the undersigned made a credibility determination in accepting the Applicant's explanation as to the pertinent events, and the case hinged on the credibility of the Applicant and his witness, Robert Lake of IJC. She further avers that, where key factual issues hinge on witness credibility, the Administrator is deemed to be substantially justified in proceeding with a certificate action, absent dispositive evidence to the contrary, and argues that that substantial justification must, therefore, be found for her prosecution of the underlying matter.

IV

The underlying certificate action arose from an emergency landing, at the Kuujjuaq airport, of N900NC, a DeHavilland Caribou DHC-4A aircraft owned by Africa Air, with the Applicant acting as pilot-in-command, on October 18, 1994. The aircraft was on a multi-leg flight from Battle Creek, Michigan, to Zaire, Africa. The first leg of the flight was from Battle Creek to Sept Isles, Quebec, on October 12, 1994. The Applicant operated N900NC on several local flights before leaving Sept Isles on October 18, 1994, with an intended destination of Frobisher Bay, Québec. Because of a mechanical emergency en route, involving the shutdown of one engine because of a loss of oil, the Applicant made an emergency landing at Kuujjuaq.

Within approximately one and one-half hours after that emergency landing, Murry Caldwell, a local aircraft mechanic, looked at the exterior of the Caribou and saw evidence of oil leaks on the engine nacelles and landing gear. He did not observe any fuel leaks, and he did not see any puddles of fuel on the ground under the airplane. With the permission of the crew, he entered the cargo compartment of the aircraft, and saw a large fuel tank and several drums of oil inside the compartment. He was not certain what they were being used for, and when he testified at the hearing, his memory of the details of how the oil drums and the fuel tank were set up inside the cargo compartment appeared to be based largely on what he observed in photographs taken the following day by Transport Canada Inspector Ian Stewart, which were shown to him during his testimony. In the photographs, Mr. Caldwell pointed out supply lines which led, from the fuel tank and two of the oil drums into the ceiling of the aircraft at the wing roots. He also identified photographs of two batteries resting on the cargo compartment floor, with electrical leads leading from them to an electrical pump on the fuel tank. He testified that, when the cowling of the left engine was later opened, he saw quite a bit of oil around the engine, and determined that there was an ice stoppage in the crankcase breather tube, which had pressurized the crankcase and caused oil to be blown out of the engine. Since he did not have time to make the necessary repairs because other business was pressing, he referred the crew of the aircraft to another mechanic who did the work. He had no knowledge of the condition of the aircraft prior to the time he saw it after it had landed at Kuujjuaq.

During the afternoon of the next day, October 19, 1994, Inspector Stewart inspected the aircraft and detained it as unsafe because he saw oil on the lower cowling doors and landing gear and a puddle of oil under the aircraft, and noticed fuel leaking from under the left wing, forming a stain on the asphalt. Inspector Stewart stated, however, that he never learned the cause of the fuel leak, and did not know how long it had existed, nor did he know whether the oil leaks had preceded the in-flight emergency which ended with the emergency landing at Kuujjuaq. Inside the cargo compartment, he saw a 500 U.S. gallon

cylindrical tank, four oil drums, and plumbing (or supply) lines going into the ceiling and out into the wings. Inspector Stewart took a number of photographs of the contents of the cargo compartment. Although he believed that the supply lines connected the supplemental fuel tank and the oil drums in the cargo compartment to the aircraft's fuel and oil systems, he did not look inside the wing cavities to determine where the supply lines went after they entered the wing cavities. Because he did not look inside the wing cavities, he was unable to determine whether the supply lines were attached to anything inside the wings.

Aircraft records examined by Inspector Stewart showed the Caribou had been sold by Union Flights of Sacramento, California, in 1994, to IJC of Norfolk, Virginia, and that it was registered to Africa Air.

The Caribou's logbook showed that 500 gallons of gasoline had been added to the tank at Sept Isles. There was an electrical pump attached to the fuel tank, and a hand pump was attached to one of the oil drums for oil feed. Inspector Stewart inferred from being told that an oil hand pump had jammed the previous day that it must have been used in flight to attempt to pump oil to the engine.⁵ He saw two 12-volt batteries sitting loose on the floor, not attached to the aircraft structure, with electrical leads from the batteries to an electrical pump mounted on the fuel tank. He considered the tank and the oil drums to be poorly secured, and asked for a Form 337 covering installation of the fuel tank and oil drums, but neither the Applicant nor a mechanic on board were able to produce one. Inspector Stewart was shown an entry the Caribou's logbook, dated October 9, 1994, stating that the wiring of the auxiliary tank had been done.

Inspector Stewart asked the crew where they were going, and was told that the aircraft's destination was Africa, by way of Frobisher Bay; Sanderstrom, Greenland; Reykyvic, Iceland; Shannon, Ireland; Portugal; and the Canary Islands. He testified that he asked the Applicant if he had used the fuel tank and oil drums since installation, and the Applicant said that he had not used the fuel system yet, but planned to do so on a couple of legs over the North Atlantic. He admitted that his notes did not reflect this conversation.

Edward L. Hall, the FAA aviation airworthiness safety inspector assigned to this case, was in telephone contact with Inspector Stewart on October 19, 1994, but remained in Richmond, Virginia, and never saw N900NC, and, thus, had no direct personal knowledge of the condition of the aircraft at any time relevant to this case. He advised Inspector Stewart that the aircraft had to be returned to its standard fuel and oil system configuration. Subsequently, after certain corrective actions were ostensibly taken, but not actually inspected by either Inspector Stewart or Inspector Hall, the Caribou was allowed, with their consent, to leave Kuujuaq, and continue on to Africa.⁶

Inspector Hall testified that, from the photographs of the fuel leak in the wing, he could not determine whether the leaks had occurred suddenly or had existed for some period of time. He said that the photographs did not show

⁵ Inspector Stewart's notes did not reflect that any crew member said they had attempted to pump oil in flight.

⁶ Apparently, N900NC was permitted to depart from Kuujuaq with the empty auxiliary fuel tank and the full oil drums still on board, but without any connections to the aircraft's fuel and oil systems and without the batteries, which were left behind. Insofar as the evidence of record shows, the Caribou neither had, nor was required to have, a Form 337 covering the fuel tank and oil drums as a condition for its departure from Kuujuaq.

any violation in that regard. He also testified that he saw no evidence that the Caribou had taken off from Sept Isles with excessive oil leaks, and, therefore, saw no evidence of violations by the Applicant in that regard, either. Both Inspector Hall and FAA Aviation Safety Inspector John H. Phelps, who, like Inspector Hall, never saw the Caribou, agreed that, if the supply lines from the auxiliary fuel tank and oil drums stowed in the cargo compartment were not connected to the Caribou's internal fuel and oil systems, no Form 337 was required. The also agreed that the Caribou had the range, with its standard fuel tanks, to reach Shannon, Ireland, from Sept Isles, Quebec, as long as it operated only under visual flight rules ("VFR").⁷

Robert W. Lake, Vice-President and Director of Operations of IJC, which coordinated the trip for the owner of the aircraft, Africa Air, testified that an independent contractor had been hired to prepare it for the trip to Africa, and that the Applicant had been hired to replace the original pilot, who could not make the trip. He said that IJC was billed for the cost of the auxiliary fuel tank which was placed on the aircraft, but the fuel tank had not been installed for use in flight and IJC had not been billed for installation.⁸

The Applicant, testifying in his own behalf, stated that the auxiliary fuel tank and the four drums of oil on board the Caribou were intended for on-the-ground refueling and replenishing of oil in Africa, where fuel and oil are both scarce and expensive, and that there were no in-flight connections between the fuel tank and oil drums stowed in the cargo compartment and the aircraft's internal fuel and oil systems. He stated that the full auxiliary fuel tank and oil drums, along with the electric and hand pumps, were secured to the aircraft, and were being carried as cargo to Africa. He also said that they could not be used in flight to refuel the aircraft or to replenish oil for the aircraft's engines. According to the Applicant, the supply lines led into the wing cavities, where they were coiled without being attached to the aircraft's internal fuel and oil systems, and were secured with ties fastened to the wing structure.

When the left engine failed en route from Sept Isles on October 18, 1994, the Applicant ordered that the fuel in the auxiliary tank be jettisoned by gravity using a drain line leading from the fuel tank in the cargo compartment, and emptying outside the aircraft. After the aircraft had landed at Kuujuaq, and while it was on the ground, oil was pumped by hand pump from the oil drums to the left engine to replenish the oil lost during the in-flight emergency. The oil lines were connected to the engine oil reservoir from outside the wing by someone standing on a ladder to reach into wing, where the engine oil reservoir was located. The Applicant testified that the oil reservoir could only be reached from outside the aircraft, and, therefore, it was not possible to replenish the oil in flight. He further stated that, during the flight, the batteries had been in their original cartons; however, the day after the landing at Kuujuaq, the electric fuel pump had been connected to the batteries and it was used to completely empty the auxiliary fuel tank in the cargo compartment. The Applicant denied that he told Inspector Stewart that the auxiliary fuel system could be used in flight, or that he intended to use it on legs over the North Atlantic, and he testified that

⁷ An aircraft flying VFR does not have to have fuel to reach an alternate airport, and without fuel to reach an alternate airport, the Caribou would have been at substantial risk if adverse weather conditions developed at its primary destination airport.

⁸ Lake later submitted a letter and invoice from Jay Payner, owner of Union Flights, who said that his company had sold N900NC, along with the fuel tank and various assorted parts, to Africa Air, but that the fuel tank was secured in the aircraft as cargo, and was not hooked up or connected to any system on board the aircraft.

the photographs taken by Inspector Stewart on the ground do not represent the way the Caribou looked in flight.

V

The Administrator's complaint alleged that N900NC had not been properly returned to service before the flight from Sept Isles to Kuujuaq, because it had: (1) a bad fuel leak in the left wing; (2) oil leaks in both engines; (3) an unapproved 500-gallon supplemental in-flight auxiliary fuel system installed in the cargo compartment, with an electrical pump and fuel, and lines leading into the wing cavities; and (4) an unapproved supplemental in-flight oil system composed of four 44-gallon oil drums stored in the cargo compartment, to which were attached a hand pump and oil supply lines leading into the wing cavities.

By reason of the above, the Administrator charged that the Applicant had violated FAR § 91.7, by operating an aircraft when it was in an unairworthy condition; § 91.13(a), by operating an aircraft in a careless or reckless manner so as to endanger the life or property of another; §§ 91.407(a)(1) and (2), by operating an aircraft without prior approval for return to service and without having proper maintenance records after it had undergone maintenance or alteration; and § 91.203(c), by operating an aircraft with a fuel tank installed in the passenger or baggage compartment without a copy of a Form 337 authorizing the installation on board the aircraft.

At the hearing, the Administrator contended that the fuel tank and oil drums were in use in flight while the Caribou aircraft was being operated on October 18, 1994, from Sept Isles to Kuujuaq. The Administrator maintained that installation of the in-flight auxiliary fuel and oil system required a completed FAA Form 337, which the Applicant did not possess. The Applicant countered that the auxiliary fuel tank and oil drums were not connected to the aircraft's fuel and oil systems in flight, and that while the aircraft was in flight, the fuel tank, oil drum, hoses, and pumps were tied down and stowed, and, therefore, no Form 337 approving the installation was required. He asserted that the fuel and oil was intended to be used only for ground servicing of the aircraft.

The allegations concerning fuel and oil leaks were dismissed at the hearing at the conclusion of the Administrator's case in chief.⁹ In dismissing the rest of the Administrator's complaint in a written decision issued after the conclusion of the hearing, the undersigned found that there was no direct evidence, and insufficient circumstantial evidence, to meet the Administrator's burden of proof by a preponderance of the evidence that a supplemental in-flight fuel and oil system had been installed on the Caribou. None of the Administrator's witness were able to testify that they actually saw N900NC and the contents of its cargo compartment before the aircraft left Sept Isles, or while it was en route to its unplanned landing at Kuujuaq, or even immediately after it landed at Kuujuaq. Neither did the Administrator present any witness who looked inside the wing cavities after the aircraft had landed at Kuujuaq. Thus, the Administrator presented no witness who, based on first-hand observation, could dispute the Applicant's testimony that the supply lines were coiled and secured with ties to the wing structure, and were not connected to the aircraft's fuel and oil systems. In place of eyewitness testimony, the Administrator presented only conjecture and speculation to show that the supply lines

⁹ The Administrator argued that the alleged violations pertaining to the fuel and oil leaks were of FAR § 91.7, with a residual charge under § 91.13(a).

were connected to the Caribou's fuel and oil systems in flight. The photographs of the Caribou's cargo compartment, taken by Inspector Stewart after the aircraft had landed at Kuujuaq, do not show the supply lines inside the wing cavities, and Inspector Stewart admitted that he did not look inside the wing cavities. The undersigned found the Applicant to be a credible witness, and accepted his claim that the auxiliary fuel and oil systems were neither installed on the aircraft for use in flight nor attached to the Caribou's fuel and oil system, and, thus, dismissed the Administrator's complaint.

On appeal to the full Board, the Administrator argued that the undersigned overlooked evidence which supported affirmation of the allegations of violations of FAR §§ 91.407 and 91.13(a). In particular, the Administrator asserted that, notwithstanding the acceptance of the Applicant's claims that the auxiliary fuel and oil systems were not installed on the aircraft for use in flight and that the supply hoses were not attached to the aircraft during its operation, the undersigned should, nevertheless, have affirmed the §§ 91.407 and 91.13(a) charges because the aircraft had been altered by storage of supply lines in the wings, and because it was careless to carry hazardous cargo.

The Board, in affirming the initial decision and denying the Administrator's appeal, rejected the contention that storage of capped, coiled supply lines secured with tie-downs in empty wing cavities, and not attached to the aircraft, constituted an alteration, noting that the Administrator's inspector had agreed that, if the supply lines were not connected to the aircraft and were properly secured and stowed, FAA approval would not be required. The Board said: "In sum, there is no evidence to show that the storage of the hoses could affect the airworthiness of the aircraft."¹⁰ The Board also rejected the Administrator's second contention, stating that the complaint had only alleged a *residual* § 91.13(a) violation, with respect to the claim that the Applicant had improperly and, thus, carelessly, operated an aircraft with an auxiliary oil and fuel system that had been attached to the aircraft without FAA approval.¹¹ The Board further found that, as the appropriateness of carrying hazardous materials was not earlier charged or litigated, it was not a proper issue for resolution on appeal.¹²

VI

Taking into account all of the information available to the Administrator at each stage of the case, I find that she has failed to show that her position was substantially justified throughout the underlying proceeding.

It is well-established that the "issue of substantial justification [must] be determined on the basis of the 'administrative record, as a whole.'" *Application of Phillips, supra*, 7 NTSB at 168 (1990). To establish substantial justification, the Administrator must have enough evidence at each stage of the proceeding to pursue the case. *Id.* A less than thorough investigation, and an "apparent willingness to prosecute based only on assumptions based on incomplete information," does not amount to substantial justification at each step of the proceeding. *Application of Nicolai*, NTSB Order EA-3951 at 6 (1993). That,

¹⁰ NTSB Order EA-4597 at 6.

¹¹ *Id.*

¹² *Id.* The fact that the Administrator might have been reasonably justified in charging other violations of the FARs in relation to alleged hazardous cargo carried on board N900NC, but, for whatever reason, elected not to do so, does not show that the Administrator was substantially justified in bringing the charges which were included in the Order of Suspension.

it appears, is what happened in this case.

The record is devoid of any direct evidence known to the Administrator concerning the condition of the aircraft prior to its landing at Kuujjuaq; thus, there was no direct evidence available to the Administrator that would tend to show that the aircraft had preexisting oil or fuel leaks, or that a supplemental or auxiliary in-flight fuel and oil system had been installed in the aircraft and connected to the aircraft's fuel and oil systems in a manner which would allow the crew to replenish its fuel and oil in flight.

At the hearing, which is the most critical phase of the proceeding, the Administrator did not call any witnesses who were on board the aircraft while it was in flight, and none of the witnesses called by the Administrator had observed the condition of the aircraft before it left Sept Isles on the flight that ended at Kuujjuaq. The only witnesses called by the Administrator who actually saw the aircraft prior to its departure from Kuujjuaq for Africa were two Canadian citizens who looked at the exterior and interior of the Caribou after it landed at Kuujjuaq. One of those witnesses was a Canadian Government airworthiness inspector, whose position was equivalent to an FAA aviation safety inspector, and the other was an aircraft mechanic, who was employed at the Kuujjuaq airport, and determined the likely cause of the engine oil loss which had forced the Caribou to make an emergency landing at Kuujjuaq, but otherwise only superficially examined the aircraft, including the contents of its cargo compartment. Neither of these witnesses looked inside the Caribou's wing cavities, to follow the hoses they saw leading from the auxiliary fuel tank and oil drums (which were stowed in the aircraft's cargo compartment) to see if they were actually connected to the internal fuel and oil systems, after the hoses disappeared into the wing cavities.

The other witnesses called by the Administrator were two FAA aviation safety inspectors who never saw the Caribou, and did not interview either the Applicant or the mechanic who was on board the Caribou in flight. Inspector Hall testified that the photographs of the Caribou taken at Kuujjuaq did not show any FAR violations because of fuel or oil leaks, and he and Inspector Phelps agreed that a Form 337 was not necessary unless the fuel tank and oil drums stowed in the cargo compartment were connected by pumps and supply hoses to the Caribou's internal fuel and oil systems, something which neither of them had personally observed.

The only witness to testify at the hearing who had personally observed the Caribou before and during its flight from Sept Isles was the Applicant, and he testified that the supply hoses were coiled and secured inside the wing cavities, without any connection to the Caribou's fuel and oil systems. The Administrator offered no aircraft records or direct eyewitness testimony to rebut the Applicant's testimony.

Not only was there a complete absence of direct evidence; there was insufficient circumstantial evidence from which a reasonable inference could be drawn that there was a supplemental or auxiliary in-flight fuel and oil system was actually installed in N900NC at the time it landed at Kuujjuaq, or during the flight to Kuujjuaq. For example, there was no evidence that the aircraft could not make the intended flight across the North Atlantic without in-flight refueling from an on board auxiliary fuel and oil system, which would be a strong motive for installation of a supplemental in-flight fuel and oil system. The aviation safety inspectors called as witnesses by the Administrator agreed that the Caribou had sufficient range to make it across the North Atlantic to Shannon, Ireland, without a supplemental or auxiliary fuel system, if the flight were conducted under VFR

conditions, even though such a flight posed risks because of possible lack of alternate landing sites in the event that the intended destination became unusable because of adverse weather conditions.

The Administrator argues that the Applicant's alleged admission to Inspector Stewart that he had not used the auxiliary fuel system yet, but intended to use it on a couple of legs over the North Atlantic Ocean, amounted to substantial justification for her position. However, even assuming the Applicant made that statement – which he has strenuously denied – it would not have amounted to an admission that an auxiliary fuel system had been connected before or during the flight to Kuujuaq. A future intention to use the system in flight does not amount to a violation, and neither does it necessarily mean that it was hooked up, or even could have been hooked up, during the flight that originated in Sept Isles, and ended unexpectedly under emergency conditions at Kuujuaq. Moreover, Inspector Stewart's testimony regarding that alleged statement was dependent upon his recollection of events that occurred almost one and three-quarters years earlier, and his memory was not corroborated by contemporaneously made entries in his field notes.

The question here, however, was not really a question of whose testimony was more credible. Rather, it was a question of whether or not Inspector Stewart's testimony on this point, even if believed, contained sufficient facts to reasonably support the Administrator's theory that an auxiliary fuel and oil system had been installed in N900NC before it landed at Kuujuaq, and was connected to the aircraft's internal oil and fuel systems while the aircraft was in flight. The FAA did not investigate further to determine if the fuel tank and oil drum(s), which were admittedly stowed in the aircraft's cargo compartment, *could* have been connected to the aircraft's internal fuel and oil systems for in-flight use, much less that they were actually connected by hoses leading into the wing cavities and from there to the aircraft's fuel system and engine oil tanks. That, apparently, could have easily been determined if the Canadian inspector had been asked, which he was not, to look inside the wing cavities to see where the hoses from the fuel tank and oil drum(s) led. The Administrator was not obliged to conduct a more thorough investigation, of course, if the facts that she had available to her could reasonably support a violation. *Application of Pfoff*, 5 NTSB 2074 (1987); *Application of Nicolai*, *supra*. The problem with this case is that they did not.

Evidence of a future intent to make such a connection, even without benefit of a Form 337, is insufficient to establish a present violation of the FARs. In the absence of any direct evidence, or even circumstantial evidence with a reasonable basis in truth, that there was a connection between the auxiliary fuel tanks and oil drum(s) stowed in the cargo compartment and N900NC's internal oil and fuel system in flight prior to its landing at Kuujuaq, the Administrator lacked a reasonable basis for proceeding with the case. Inspector Stewart's testimony concerning the statement made to him by the Applicant, even considered in light of all the other evidence available to the Administrator, does not reasonably support the Administrator's theory of prosecution in this case. To assert that an auxiliary fuel and oil system was connected to the aircraft's systems when Inspector Stewart examined the aircraft is no more than speculation and conjecture. That does not rise to the level of substantial justification.

From information that came to his attention, to the effect that a hand pump had been broken the day before, when an attempt was made to pump oil from one of the oil drums, Inspector Stewart inferred that the crew had

attempted to pump oil to the Caribou's engines in flight before making the emergency landing at Kuujuaq. He did not, however, make an entry in his field notes concerning these observations. Moreover, the information about the broken hand pump was, itself, ambiguous, because, even if an attempt to pump oil had been made the preceding day, the attempt could have been made after the Caribou had landed and the oil drum(s) were connected externally to the engine oil reservoir, as well as while the aircraft was in flight. There was no direct evidence that the oil drum(s) had been connected to the aircraft's internal engine oil system in flight, nor was there even any evidence that the hoses observed and photographed by the Administrator's witnesses, if not already connected while the aircraft was on the ground before the flight, *could* have been connected to the aircraft's internal fuel and oil system while the aircraft was in flight. The lack of direct evidence was not compensated for by credible circumstantial evidence.

The inference which Inspector Stewart drew was not based on sufficient facts to reasonably support the Administrator's theory or position. It is well-established that the determination of whether the Administrator was substantially justified must be made on the basis of the entire administrative record.¹³ Here, however, not only is the inference, itself, drawn from an ambiguous statement, susceptible of both exculpatory and inculpatory meanings, there is nothing else in the administrative record to support the Administrator's theory that the fuel tank and oil drum(s) were connected to the aircraft's systems in flight.¹⁴

Neither did the Administrator show that she had anything more than assumptions based on incomplete information to support her position at any earlier stage of the proceeding. I find no merit in the Administrator's contention that a letter, dated December 8, 1994, from Archie Newby, on behalf of Africa Air, to Inspector Hall, in response to a letter of investigation, contained sufficient facts to show that the Administrator's position was substantially justified at that time. The letter was first produced by the Administrator as an attachment to a *post-hearing* filing in opposition to the Applicant's EAJA Application. Africa Air was the owner of the aircraft, and was not a party in interest to this proceeding. Mr. Newby was not called by the Administrator as a witness in the underlying proceeding. There is nothing in the letter to indicate that Mr. Newby in any way represented or spoke for the Applicant, and the Applicant and his attorney had no opportunity to confront the alleged statements or to cross-examine him. Neither did Mr. Newby indicate the basis for his knowledge that a fuel/oil system previously approved for ferry flights had been reinstalled on N900NC, or explain what he meant by the word "reinstalled." The letter is ambiguous and lacking in details, and is not supported by other evidence. Therefore, even if it could have been and were considered, the administrative record as a whole would not show that the Administrator was substantially justified in the position that she took.¹⁵

¹³ *Application of Pfoff, supra*, 5 NTSB at 2076.

¹⁴ For the same reasons, substantial justification is not shown by notes made by an aviation safety inspector who sat in on an informal conference attended by the Applicant, during which the Applicant said that the fuel tank was not connected to the aircraft fuel system, but that he had unsuccessfully attempted to pump oil from the oil storage tanks to the engine oil tank in flight.

¹⁵ The Administrator's case is not strengthened by another post-hearing submission, in the form of a letter from Byron Hudson, Chief Financial Officer of Africa Air, in which he said that Africa Air unwittingly neglected to submit the required paperwork. The letter was apparently submitted to the Administrator in connection with a separate proceeding before the Department of Transportation, which did not involve the Applicant, and was not offered in evidence in the underlying proceeding. Moreover, it is, likewise, too vague and ambiguous to show that the Administrator's position in this case was substantially justified.

For the foregoing reasons, I find the Administrator's position throughout this case was not reasonably justified in fact and law, and, therefore, was not substantially justified.

VII

The Administrator contends that, even though the Applicant was the prevailing party in the underlying proceeding, he is not eligible to recover attorney fees and expenses under the EAJA because his legal expenses were paid by IJC, which selected his attorney, controlled tactics and strategy, and accepted responsibility to pay the legal fees. The Administrator argues that the Government can only be liable for the expenses paid by the Applicant himself, and that it is not responsible for legal expenses which he did not incur and for which he would not be responsible in the absence of an EAJA award.

Further, the Administrator contends that special circumstances make an award of fees unjust. In this regard, the Administrator avers that the real party in interest with respect to an EAJA claim is IJC, which managed N900NC for its owner, Africa Air, and maintains that, since the owner and its representative admitted that they did not document and obtain approval for the installation of an auxiliary fuel system, it would be unfair to award EAJA fees to them. The Administrator further contends that the owner and its representative admitted to the violations during the FAA's investigation, thereby removing the need for further investigation by the FAA, and only later, decided to challenge the FAA on appeal along with the pilot.

In asserting that the real party in interest was IJC, the Administrator notes that the first billing for professional services through April 30, 1995, starts out with a telephone call from IJC, engaging the services of the Applicant's counsel. Also included as part of the claim is a letter from IJC, dated October 27, 1997, seeking inclusion in the Applicant's EAJA claim of expenses paid by IJC for the Applicant's travel to Richmond, Virginia, and Washington, D.C., for hearings, and a letter from the Applicant, initially addressed to African Development Corp., but apparently referred to IJC for payment, claiming expenses for a trip to Richmond, Virginia, for an informal conference with the FAA. The Administrator also notes that the Applicant's counsel had stated that IJC was paying for the defense of her certificate action against the Applicant.

The Applicant counters that, even if his former employer, IJC, advanced money for his defense, that did not make him any less responsible or change his status as the only real party in interest. While there were conferences with IJC, which employed the witnesses and controlled the documents, there is no evidence that the Applicant was not responsible for legal fees and expenses.

The Applicant does not deny the Administrator's assertion that his counsel told representatives of the FAA that IJC was paying for his defense in this case. As pointed out by the Administrator in a letter to Applicant's counsel on IJC stationary dated October 27, 1997, IJC submitted expenses, totaling \$2,528.07, paid by IJC, for the Applicant's airfare, hotels, meals, etc., for three trips relating to the underlying proceeding. The letter, which is signed by Dudley Olcott for IJC, states: "I am making the assumption that you will include your legal charges you paid on Mr. Livingston's behalf and his out-of-pocket expenses in the claim you file."

In a letter dated September 20, 1997, addressed to African Development Corp., but apparently referred by a handwritten notation to IJC, the Applicant claimed expenses for a trip to Richmond, Virginia, for an informal hearing with the FAA on September 18 and 19, 1995, totaling \$890.07. Also included in the Applicant's EAJA claim are travel expenses of Mr. Lake, of IJC. On the top of three meal receipts, signed by the Applicant's counsel, and included in the EAJA claim, is the handwritten notation "International Jet Charter."

On the basis of the foregoing, and in the absence of a denial by the Applicant, I conclude that there is sufficient evidence to establish that the Applicant's legal fees and expenses in this case were paid by his former employer, IJC, who was his employer at the time of incident that triggered the underlying proceeding. It is also clear from the aforementioned letter from Mr. Olcott of IJC, that IJC expected that the legal fees of Applicant's counsel and out-of-pocket expenses on behalf of the Applicant would be included in the EAJA claim. Beyond that, there is nothing in the record concerning the Applicant's financial arrangements with IJC.

There appears to be at least an implied arrangement between the Applicant and IJC to the effect that, if the Applicant recovers fees and expenses under the EAJA, he will reimburse IJC for the attorney fees and expenses which it paid on his behalf in defending this action.¹⁶ There is nothing in the record to suggest that, if the Applicant were to fail to recover attorney fees and expenses under the EAJA, he will have any obligation to repay IJC for the attorney fees and expenses it paid. Conversely, there is nothing in the record to suggest that the Applicant and IJC contemplated that the Applicant could keep, as a windfall, any portion of the fees and expenses paid by IJC that he may recover under the EAJA.

In *Application of Scott*, NTSB Order EA-4472 (1996), the Board held that an EAJA applicant was not precluded from recovery for attorney fees and expenses under the Act because he was neither charged for representation nor under any apparent obligation to pay for that representation, but had agreed to pay his representative(s) contingent upon, and from, his EAJA award, should he prevail. There, the Board stated: "Overall, it is clear that the courts have, through various mechanisms, created a body of law that permits fee shifting when doing so will reduce the economic deterrents faced by individuals who wish to vindicate their rights as against the government. Our decision is consistent with these principles."¹⁷

¹⁶ If there is an express arrangement to that effect, it is not a part of the record. However, it is a reasonable inference from IJC's October 27, 1997, letter, that it expected the Applicant to make an application for attorney fees and expenses paid by IJC on his behalf. It is reasonable that an employer would pay the legal costs of an employee in defending an action which arose from actions within the scope of his employment. It is not reasonable that an employer, under such conditions, would pay its employee's legal fees and expenses, on the one hand, and not expect that the employee reimburse it for the expenses it paid on the employee's behalf, at least to the extent that the employee recovers attorney fees and expenses from the Government in an EAJA action.

¹⁷ NTSB Order EA-4472 at 9. In the *Scott* case, none of the persons who performed services on the applicant's behalf charged him for those services. Attorneys provided to him by the Air Line Pilots Association were paid for in the form of salary by the membership of the union. His other representative and his experts all provided those services on their own time and at their own expense. The Board found there was a contingency fee arrangement agreed to by the applicant, under which he committed to payment of fees and expenses to the extent such fees and expenses might be recovered under the provisions of the EAJA.

In the instant case, there is at least an implied agreement that the Applicant will reimburse IJC for attorney fees and expenses it incurred on his behalf in defending the underlying action, and that, to the extent that he recovers any portion of those fees and expenses under the EAJA, he will be required to reimburse IJC therefor. In view of *Scott*, I find that the Applicant is not precluded from recovery of attorney fees and expenses here merely because, under this arrangement, such fees and expenses had been borne by IJC.

VIII

I likewise find no basis for denying the Applicant recovery of fees and expenses under the EAJA on the grounds that special circumstances would make such an award unjust. The Board has previously noted, in *Application of Cross*, NTSB Order EA-3601 (1992) that the special circumstances test is a safety valve, intended "to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts."¹⁸ In that case, the Board went on to say that "special circumstances have also been found to be the presence or absence of any bad faith or obdurate conduct on the part of either party, and any unjust hardship that a grant or denial of fee-splitting might impose."¹⁹

There is no evidence in this case of bad faith or obdurate conduct on the part of the Applicant which misled or lulled the Administrator into some form of false security, so that the Administrator and her representatives conducted a less than thorough investigation and/or less than thorough trial preparation. The Administrator has the prosecutorial discretion to do as much or as little pretrial preparation as she and her investigators and attorneys choose. Prudence and caution would seem to suggest that the Administrator should continue to prepare for the eventuality that a case will go to a hearing until such time as the case actually settles or the appeal is dropped. If, at some point prior to the hearing, the Administrator chooses not to conduct further investigation, on the supposition that the respondent will not contest the case, the risk of lack of preparation is on the Administrator if she guesses wrong and, contrary to her expectations, the case actually goes to an adversary hearing. Nothing done by the Applicant in this case precluded or inhibited the Administrator's inspectors from continuing their investigation or her attorneys from continuing to prepare for the hearing. If they did less than they could have, that was their decision, and they must bear the consequences. In the absence of any showing that the Applicant acted in bad faith, or that he attempted to unfairly impede the Administrator's investigation, there is nothing to show special circumstances which make an award of fees unjust here.

IX

Accordingly, I find that the Administrator has not shown either that her position in this case was substantially justified or that special circumstances exist would make an award of fees unjust. Thus, the Applicant is entitled to recover fees and expenses, to the extent they are otherwise allowable under the EAJA.

¹⁸ *Application of Cross, supra*, NTSB Order EA-3601 at 4, quoting S. Rep. No. 96-253 at 7 (96th Cong., 1st Sess.), H.R. Rep. No. 96-1418 at 11 (96th Cong., 2nd Sess.).

¹⁹ *Application of Cross, supra*, NTSB Order EA-3601 at 5, citing *Burke v. Gainey*, 700 F.2d 1039, 1044 (1st Cir. 1983)

X

As to the amount of fees and expenses for which recovery may be had herein, the Administrator has averred that the amounts claimed by the Applicant are excessive. In this regard, she maintains that fees and expenses incurred prior to the filing of the complaint are not recoverable under the EAJA. She also argues that fees associated with (1) an unfounded motion to dismiss; (2) correspondence with members of Congress, the Department of Transportation's Inspector General and the FAA, concerning the Applicant's records; (3) "unnecessary" legal research; and (4) the "training" of a second attorney; should be excluded from the Applicant's award. In addition, the Administrator urges that the Applicant's claimed bar expenses, as well as costs incurred for "excessive" use of Federal Express and courier services, do not warrant inclusion in the award, because they do not represent legitimate expenses associated with the Applicant's defense of the underlying certificate action. While the Applicant's counsel has conceded that 36 hours, representing work performed prior to the filing of the complaint, should be deducted from the initial request for attorney fees, the Administrator has requested that the Applicant be required to submit a corrected statement, "pared down to only those items that are proper for consideration."

The Board's decision in *Application of Petersen, supra*, is dispositive of whether or not fees and expenses can be recovered for work performed prior to the filing of the complaint. In that case, the Board held that "fees and expenses incurred prior to the filing of the Administrator's complaint with the Board may not be the subject" of an award under the EAJA. NTSB Order EA-4490 at 8. In this regard, the Board noted that the EAJA applies only to "adversary adjudications," (*id.*) and observed that the "Act was not intended to reimburse for *all* expenses incurred" (*id.* At 9 n.3 (emphasis added)).

In this case, the Applicant has filed claims for attorney fees and expenses incurred beginning in September 1995, and continuing through the preparation of his EAJA claim. The complaint, however, was not filed until December 28, 1995. Therefore, the Applicant is entitled to recover only those allowable fees and expenses incurred on and after December 28, 1995, and all amounts claimed for fees and expenses incurred on or before December 27, 1995, are not recoverable herein.²⁰

For professional services, including attorney fees and expenses, through October 31, 1995, the Applicant claims a total of \$5,550.00, including 27.75 hours in attorney fees, billed at the rate of \$200 per hour for his attorney's services, and expenses totaling \$343.25. The attorney fees claimed by the Applicant for the period from November 1, 1995, through December 27, 1995, are contained on a bill which covers the period until May 2, 1996. For the period ending December 27, 1995, the Applicant claimed attorneys fees based on 8.25 hours of work billed at \$200.00 per hour, for a total of \$1,650.00. Based on the above analysis, the Applicant's claim for reimbursement of attorney fees must be reduced by those 36 hours, which were expended prior to the filing of the complaint in the underlying proceeding. Expenses which were included on the bill covering the period from November 1, 1995, through May 2, 1996, are not

²⁰ According to the Applicant's submissions, the first post-December 27, 1995 attorney services performed by his counsel on his behalf occurred on January 2, 1996.

broken down by date, and it is, therefore, impossible to tell when these expenses were incurred. However, as the Applicant has not shown that such expenses were incurred after the complaint was filed, they will be disallowed *in toto*.

The Administrator objects to any award of fees and expenses related to contacts by the Applicant with members of Congress, the Inspector General of the Department of Transportation and the FAA, concerning the Applicant's records. Eligible fees under the EAJA are those resulting from an adversarial adjudication. *Application of Thompson*, NTSB Order EA-4353 at 4 (1995), citing 49 C.F.R. § 826.1.²¹ In the *Thompson* case, the Board held that fees incurred by the applicant in a petition to the Board for rulemaking to increase the cap on the amount of recoverable attorney fees were not recoverable under the EAJA because rulemaking is not an adversary adjudication. The Board distinguished rulemaking as legislative in nature, and adjudication as judicial in nature. In *Application of Whittle*, 5 NTSB 727, 728 (1985), the Board described the purpose of the EAJA as follows:

The express language of the EAJA and the legislative history of the Act reflect that the intent of Congress in enacting the EAJA was to diminish the deterrent effect of seeking review of, or defending against, unreasonable Government action by providing for the award of attorney fees, expert witness fees, and other costs against the United States. The deterrent to which Congress referred, however, was the cost involved in securing a defense by obtaining the services of counsel, expert witnesses, studies, analyses, engineering reports, tests and projects, and other expenses of that nature.

In this case, contacts by the Applicant with Congress, the Inspector General of the Department of Transportation and the FAA, even if they concerned the Applicant's pilot records, were not part of the process of adversarial adjudication. The Applicant quite clearly stepped outside of the adjudicatory process in an effort to bring pressure on the FAA to resolve these matters in a manner favorable to himself. That is not to say that there was anything wrong with such an attempt. It was simply neither judicial in nature nor a part of the adversarial adjudication process – the purpose of which is to bring orders of the Administrator affecting airmen's certificates before the National Transportation Safety Board for review on appeal. Accordingly, all claims for fees and expenses related to contacts with members of Congress, the Inspector General of the Department of Transportation and the FAA, concerning the Applicant's records, will be disallowed.

It appears that all amounts claimed by the Applicant for Congressional contacts have already been disallowed, as they occurred prior to the filing of the Administrator's complaint in the underlying proceeding. In addition, for the reasons set forth above, I will deny the Applicant's claim for reimbursement of attorney fees for 6.5 hours, between July 19, 1996, and September 12, 1996, for contacts with the Inspector General of the Department of Transportation, concerning the status of the Applicant's FAA records.²²

²¹ See also 5 U.S.C. § 504(a)(1).

²² Although the Administrator has objected to the allowance of fees and expenses for contacts with the FAA, there do not appear to be any FAA contacts for which fees and expenses have been claimed by the Applicant.

I find it unnecessary to order a corrected statement of fees and expenses from the Applicant, as requested by the Administrator. There is sufficient itemization, for purposes of review, even if, in some respects, the itemization does not strictly meet the requirements of the Board's rules.²³ In this regard, see *Application of Scottile*, 4 NTSB 1217, 1221 (1984).²⁴ The itemized statements provided show the hours spent in connection with the proceeding and a description of the services performed by Michael J. Pangia, Esq., the Applicant's attorney of record, the rate at which each fee was computed, the expenses claimed, and the total amount claimed. To the extent that some portions of the Applicant's claim are not itemized and the services for which the claim is being made cannot be identified, they will be disallowed, as the Board has previously opined that, in such instances, "an applicant . . . will not be heard to complain that the number of hours assigned to the rejected portion of an aggregate entry is inaccurate." *Application of Docherty*, NTSB Order EA-4385 at 6 n.3 (1995).

The Board has said that while it is not its "function to second-guess each minute detail of an attorney's work on a case, neither is it a responsible exercise of our review function to approve the reimbursement of expenses that appear excessive and are inadequately documented." *Application of Thompson, supra*, NTSB Order EA-4353 at 4 n.5. In that case, the Board declined to second-guess the strategy employed by the applicant's counsel or to rate all of the alternative arguments he made on behalf of his client. There, the Board held: "We have not found that the motions and brief were frivolous, a determination that is enough for our purposes here." *Id.* at 3. Likewise, I see nothing here to indicate that the legal research conducted by the Applicant's attorney and the motions he filed were frivolous, and I decline to second-guess him as to matters which on their face do not appear to be. The attorney fees claimed by the Applicant for the professional services of Mr. Pangia will, thus, be allowed, except as otherwise noted herein.

Although the Mr. Pangia billed the Applicant for his services at the rate of \$200.00 per hour, the maximum hourly rate at which attorney services rendered in 1996²⁵ may be reimbursed under 49 C.F.R. § 826.6 is \$130.00.²⁶ Therefore, that figure will be used in computing the Applicant's award.

²³ See 49 C.F.R. § 826.23. "Documentation of fees and expenses. The application shall be accompanied by full documentation, including the cost of any study, analysis, engineering report, test project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The administrative law judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed."

²⁴ "Although the application . . . may not meet the strict letter of our rule, we believe that the deviations were not material."

²⁵ See n.17, *supra*.

²⁶ This amount is based on a formula set forth in 49 C.F.R. § 826.6, using the 1996 Consumer Price Index ("CPI") for All Urban Consumers, U.S. City Average. As the 1997 CPI is not yet available, the 1996 figure is also used for determining the maximum hourly rate for which legal services performed in 1997 may be awarded in EAJA actions. Thus, the allowable fees for Mr. Pangia's services will be reimbursed at the rate of \$130.00 per hour, rather than the lesser hourly rate of \$128.70 that the Applicant claimed in his EAJA application.

Insofar as the use of a second attorney in this case is concerned, I do not find this to be *per se* unreasonable. See *Application of Docherty, supra*, NTSB Order EA-4358 at 7-8. However, the Applicant's fee application, which claims reimbursement for professional services totaling 206.75 hours by Mr. Pangia's associate, Karla Saguil, Esq. (whose services were billed at the rate of \$100 per hour), as his second attorney is not itemized and does not specify what services she performed. For example, the bill for attorney fees and expenses covering the period from May 3 through May 29, 1996, itemizes professional services totaling 62.5 hours by Mr. Pangia, billed at a rate of \$200 per hour, for a total of \$12,500.00, and services by an associate totaling 86.5 hours, billed at the rate of \$100.00 per hour, for a total of \$8,650.00. The precise services performed by Ms. Saguil, however, are neither identified nor itemized. In the absence of a supporting description of those services, meeting the requirements of 49 C.F.R. § 826.23, I find that Ms. Saguil's services are not reimbursable under the EAJA, except to the extent noted below. The same situation exists with respect to bills for attorney fees and expenses from May 31 through August 20, 1996, and August 22 through December 31, 1996, which contain non-itemized and unspecific claims for professional services rendered by Ms. Saguil, totaling 120.25 hours, billed at the rate of \$100.00 per hour.

Although there is no itemized statement for Ms. Saguil's professional services, the record does show that she assisted Mr. Pangia at the five-day hearing in this case. As the Administrator was also represented by two attorneys during the hearing, I find that there is no justifiable reason not to extend to the Applicant the right to make use of the services of second attorney at the hearing, as well. Allowing an average of 10 hours per day for each hearing day,²⁷ I will award the Applicant a total of \$5,000.00 for the services of an associate attorney assisting Mr. Pangia at the hearing, based on a rate of \$100.00 per hour for 50 hours. See *Application of Docherty, supra*. The remaining 156.75 hours claimed for professional services of Ms. Saguil must be disallowed, for the reasons noted above. Therefore, the Applicant shall be awarded \$5,000.00 (50 hours at \$100 per hour) for professional services of a second attorney. The remainder of the claim for services of a second attorney shall be disallowed.

The Applicant has not documented why it was necessary to use Federal Express – rather than the U.S. Mail – to deliver various documents, nor is it apparent what documents were sent by that means. Therefore, I will disallow expenses for Federal Express shipments included in the Applicant's claim,²⁸ totaling \$163.50.

The Applicant also seeks reimbursement for his own travel expenses (including airfare, lodging and meals) for a trip to Richmond, Virginia, on September 18-19, 1995, to attend an informal conference; a second trip to Richmond on May 21-23, 1996, for the first session of the hearing; and a trip to Washington, D.C., on June 19-21, 1996, for the second hearing session. The entire amount claimed by the Applicant for the expenses associated with these trips is \$3,947.56. Included in this total are: \$811.62, which was included in the expenses of \$3,587.10 submitted by Mr. Pangia; \$703.87 in out-of-pocket expenses paid by the Applicant; and \$2,432.07 paid on his behalf by IJC. The

²⁷ Which I will treat as the equivalent of an Itemized accounting for Ms. Saguil's professional services at the hearing.

²⁸ While the Administrator has also objected to the inclusion in the Applicant's award of the costs associated with the use of courier services, the Applicant does not appear to claim reimbursement for any such services herein.

Board, however, has previously held that the EAJA does not contemplate the reimbursement of an applicant's personal expenses. *Application of Rooney*, 5 NTSB 776, 777 (1985); *Application of Gay*, NTSB Order EA-3763 at 9 (1993). Thus, the entire sum of \$3,947.56, claimed by the Applicant for his personal expenses must be excluded from his EAJA award.²⁹

XI

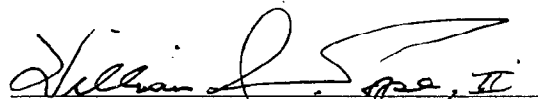
In view of the foregoing, the Applicant is entitled to an award under the EAJA in the amount of \$29,994.33, computed as follows:

Item	Claimed	Disallowed	Allowed	Amount
Professional services of Michael J. Pangia	217.00 Hrs.	42.50 Hrs.	174.50 Hrs. @ \$130.00/hr.	\$22,685.00
Professional services of Karla Saguil	206.75 Hrs.	156.75 Hrs.	50.00 Hrs. @ \$100.00/hr.	5,000.00
Expenses billed to Applicant	3,587.10	1,373.77	2,213.33	2,213.33
Applicant's out-of-pocket expenses	703.87	703.87	-0-	-0-
International Jet Charter expenses	2,528.07	2,432.09	96.00	96.00
TOTAL AMOUNT ALLOWED				\$29,994.33

ORDER

IT IS HEREBY ORDERED that the Administrator shall pay the sum of \$29,994.33 to the Applicant within 30 days of the date of this Order.

Entered this 20th day of March, 1998, at Washington, D.C.


 WILLIAM A. POPE, II
 Judge

²⁹ Separate and apart from the disallowance of the full amount of personal expenses claimed by the Applicant under *Rooney* and *Gay*, the undersigned notes that expenses associated with his attendance at the informal conference would be independently excludable as preceding in time the filing of the complaint in the underlying proceeding. In addition, the undersigned believes that the liquor charges noted among the expenses shown for the Applicant (\$69.00, incurred at the Army-Navy Club of Washington, D.C.) would be separately excludable, as only those costs associated strictly with transportation, food and lodging would appear to be reimbursable as legitimate travel expenses under the EAJA.

APPEAL

Any party to this proceeding may appeal this written initial decision and order by filing a written notice of appeal within 10 days after the date on which it has been served. An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 5531
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this initial decision or order. An original and 3 copies of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of the other party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by the other party within 30 days after that party was served with the appeal brief. An original and 3 copies of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on the other party.

An original and 3 copies of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other party.

The Board directs your attention to Rule 38 of its Rules Implementing the Equal Access to Justice Act (codified at 49 C.F.R. § 826.38) and Rules 43, 47 and 48 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.43, 821.47 and 821.48) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.

INITIAL DECISIONS

FOR THE MONTH OF

OCTOBER 1999

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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

ADMINISTRATOR *
Federal Aviation Administration *
Complainant, *
v. * Docket Number
ALAN N. KACHALSKY, * SE-15603
Respondent. *

Room 238
26 Federal Plaza
New York, New York 10278

Thursday,
October 7, 1999

The above-entitled matter came on for
hearing, pursuant to Notice, at 10:00 a.m.

BEFORE: HONORABLE WILLIAM E. FOWLER, JR.
Chief Judge

APPEARANCES:

On behalf of the Complainant:

JACQUELINE STANFORD, ESQ.
Eastern Region
Federal Aviation Administration
Federal Building #111
John F. Kennedy International Airport
Jamaica, New York 11430

On behalf of the Respondent:

ALAN N. KACHALSKY, ESQ., PRO SE
42C Rye Colony
Rye, New York 11430

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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

ADMINISTRATOR *
Federal Aviation Administration *
Complainant, *
v. * Docket Number
ALAN N. KACHALSKY, * SE-15603
Respondent. *

INITIAL ~~ORDER~~ DECISION AND ORDER

BY CHIEF JUDGE WILLIAM E. FOWLER, JR.

This has been a proceeding before the National Transportation Safety Board, held pursuant to the provisions of the Federal Aviation Act of 1958, as that Act was subsequently amended, and the Board's Rules of Practice in Air Safety Proceedings, on the Appeal of Alan Neal Kachalsky from an Order of Suspension issued by the Administrator of the Federal Aviation Administration, which seeks to suspend Kachalsky's Commercial Pilot Certificate Number 002222006 for a period of 60 days.

Under the Board's Rules of Practice, the Administrator's Order of Suspension as provided by the Board's Rules of Practice serves herein as the complaint and was filed on behalf of the Administrator

1 of the Federal Aviation Administration, herein the
2 Complainant, through his Regional Counsel, Eastern
3 Region, of the Federal Aviation Administration.

4 This matter has been heard before this United
5 States Administrative Law Judge, and as is provided by
6 the Board's Rules of Practice, specifically Section
7 821.42 of those rules, as the judge in this proceeding,
8 I have chosen to invoke the option granted to me under
9 that section to issue an Oral Initial Decision and *ORDER*
10 forthwith at this time, as opposed to a subsequent
11 written decision.

12 Following Notice ^{TO} ~~of~~ the parties, this matter
13 came on for trial on October 7th, 1999, in New York
14 City, New York. The Respondent appeared and
15 represented himself, although he is an attorney-at-law
16 of record in the City and State of New York. The
17 Administrator was very ably represented ~~as was the~~
18 ~~Respondent, I might add,~~ by Jacqueline Stanford,
19 ~~Jacqueline Stanford~~, Esquire, of the Regional
20 Counsel's Office, Eastern Region, of the Federal
21 Aviation Administration.

22 Both parties have been afforded the full and
23 complete opportunity to offer evidence, to call,
24 examine, and cross examine witnesses. In addition, the
25 parties have been afforded the opportunity to make

1 argument in support of their respective positions.

2 During the course of this proceeding, we have
3 had ^{THE} testimony of five witnesses, three by the
4 Administrator, two by the Respondent, including the
5 testimony of the Respondent himself. We have ^{HFD} a total
6 of 14 documentary exhibits duly admitted into the
7 hearing record as it's presently constituted. 10
8 exhibits by the Respondent, four by the Administrator.

9 As I stated earlier, I have reviewed the
10 testimony of the witnesses as well as the documentary
11 exhibits. It is my determination and finding that the
12 Administrator was not arbitrary or capricious in
13 bringing the charges that he has alleged -- ~~as alleged~~
14 against Alan Neal Kachalsky, the Respondent in this
15 proceeding.

16 Now, it's true there were two dates involved
17 here of alleged violations. The majority of the
18 allegations pertained to the first date of July 26th,
19 1998, pertaining to the alleged infractions of the
20 Federal Aviation Regulations on the Respondent's flight
21 on that date, July 26th, 1998, in the vicinity of Burnt
22 Meadows in Gardner, New York.

23 The other allegations of August 3rd, 1998, at
24 the beginning of this -- at the outset of this
25 proceeding, the Administrator has withdrawn those

1 allegations.

2 Now, as so often happens in a lot of these
3 cases that I've had the privilege and pleasure of
4 ~~hearing and~~ hearing, you have diametrically-opposing
5 testimony. You have three witnesses by the
6 Administrator, eyewitnesses, percipient witnesses, all
7 of whom were put in a state of surprise, if not fear,
8 and even some shock by what they saw ^{REGARDING} ~~the~~ the
9 Respondent's aircraft on the date, time and place in
10 question of July 26th, 1998.

11 Respondent has admitted that he holds the
12 pilot certificate, that the Administrator has alleged
13 that he owned the aircraft that the Administrator has
14 alleged in its complaint, and that he operated the
15 aircraft on the date of July 26th, 1998, in the
16 vicinity of Burnt Meadows in Gardner, New York.

17 Now, I cannot and will not reject out of hand
18 the testimony of the three eyewitnesses at
19 approximately 11 a.m. on the morning of July 22nd,
20 1998, when they were startled by the appearance of
21 Respondent's flight.

22 Mrs. Jennifer Cottingham, the first witness
23 who testified in depth, said that the plane made
24 several extremely low altitude passes over her farm and
25 then returned to repeat the same pattern over their

1 neighbors' properties.

2 In summation, Mrs. Cottingham said, in
3 addition to being dangerous, such flying patterns are
4 ~~very~~, very intrusive.

5 The highlights of Mr. Conrad Gustafson's
6 testimony was that he saw a small single-engine
7 airplane appear flying at a startlingly-low altitude
8 over the Cottinghams' property and surrounding lands.
9 "The plane made several very low passes in the area a
10 number of times at heights" to quote him "I estimated
11 to have been under a 150 feet above the ground."

12 Mr. Gustafson goes on to say, in fact, on the
13 first pass, it appeared to him that the plane was
14 flying just above the tree level.

15 In addition, Witness Gustafson said, "In
16 addition to being noisy and disruptive, his flying was
17 frightening to everyone present at the Cottinghams'
18 farm; in particular to his daughter and other children
19 whose safety on horseback was of paramount concern to
20 me."

21 As I said, the testimony, as so often happens
22 in these cases, is diametrically opposing.

23 The Respondent's side of the case was ^{THAT} the
24 Respondent and his witness, said at no time, ~~at no time~~
25 did they see any people or horses or did they come

1 within 500 feet of any person, structure or vessel.

2 Administrator's side of the case, ~~because~~, *WHS*
3 the testimony of the three Administrator's cases that I
4 just alluded to.

5 Sometimes, not always, pilots are so
6 preoccupied with what they're doing, that they're not
7 fully cognizant and aware of just where they are and
8 what they're doing. There's no way I can reject the
9 testimony of three eyewitnesses who were surprised or
10 frightened or put in fear and apprehension by the low
11 flight of Respondent's aircraft.

12 So, as I stated earlier, the Administrator
13 certainly has not been arbitrary and capricious in
14 bringing ~~this~~ -- these charges against Mr. Kachalsky.

15 Now, it's true that he is a very experienced
16 pilot and flight instructor. His previous record is
17 exemplary. He's never been charged for anything
18 before.

19 However, this is an aggravated case when you
20 put this many people in fear and apprehension and
21 involving not one, not two but several very low passes
22 over people, structures, and property. I cannot be
23 unmindful of this ^{BUT} because of the withdrawal of and
24 deletion of the August 3rd, 1998, allegations. I will
25 reduce the sanction, but I cannot substantially reduce

1 the sanction because this case is aggravated flying
2 at -- in any respect, any regard.

3 So that, ladies and gentlemen, based on my
4 review of the totality of the evidence, coupled with
5 the documentary exhibits, I would proceed to make the
6 following specific Findings of Fact and Conclusions of
7 Law.

8 1. The Respondent, Alan Neal Kachalsky,
9 admits and it is found that he was and is the holder of
10 Commercial Pilot Certificate Number 002222006.

11 2. The Respondent admits and it is found
12 that he is also the registered owner of a Cessna 150M
13 Aircraft, Identification Number N 8730 U.

14 3. The Respondent admits and it is found
15 that on or about July 26th, 1998, -- are we all right,
16 Mr. Graber?

17 It is found that Respondent operated the
18 aircraft in the vicinity of Burnt Meadows in Gardner,
19 New York.

20 4. It is found that on July 26th, the
21 Respondent, Alan Neal Kachalsky, operated the aircraft
22 over persons, vehicles or structures on or near Burnt
23 Meadows in Gardner, New York, below an altitude that
24 would allow if a power unit failed an emergency landing
25 without undue hazard to property or persons on the

1 surface.

2 5. It is found that the Respondent, on July
3 26th, operated an aircraft on or near Burnt Meadows in
4 Gardner, New York, at an altitude below 500 feet above
5 the surface or over sparsely-populated areas at an
6 altitude closer than 500 feet to people, vessels,
7 vehicles or structures.

8 6. It is found that as a result of
9 Respondent's actions, the Respondent, Alan Neal
10 Kachalsky, operated an aircraft in a careless manner so
11 as to potentially endanger the life ~~and~~ ^{AND} property of
12 others.

13 And 7. It is found that by reason of the
14 following, the Respondent violated the following
15 sections of the Federal Aviation Regulations. 1.
16 Section 91.119(a); 2. Section 91.119(c); and 3.
17 Section 91.13(a). All of those regulations as set
18 forth in the Administrator's Complaint.

19 8. This Judge finds that safety in air
20 commerce or in air transportation and the public
21 interest does apparently require the affirmation of the
22 Administrator's Order of Suspension, dated April 15th,
23 1999, in view of the Respondent's violation of Section
24 91.119(a), 91.119(c) and 91.13(a) of the Federal
25 Aviation Regulations.

1 However, because of all of the pertinent and
2 salient allegations as set forth in the Administrator's
3 Complaint, coupled with the testimony and documentary
4 exhibits that have been adduced during the course of
5 this hearing ~~in this proceeding~~ here today, and the
6 deletion of the August 8th, 1998, charges, this Judge
7 will modify the sought sanction of the 60-day period of
8 suspension of the Respondent's Commercial Pilot
9 Certificate to a suspension of 45 days.

10 ORDER

11 IT IS ORDERED that the Administrator's Order
12 of Suspension, dated April 15th, 1999, be and the same
13 hereby is modified to a period of suspension of
14 Respondent's Commercial Pilot Certificate 002222006 for
15 a period of 45 days.

16 This Order is issued by William E. Fowler,
17 Jr., United States Administrative Law Judge.

18 APPEAL

19 Either party to this proceeding may appeal
20 the Judge's Oral Initial Decision. Appellant must file
21 his Notice of Appeal within 10 days of the Judge's
22 decision, and within 50 days, he must file a brief
23 setting forth his objections to the Judge's Oral
24 Initial Decision.

25 ^{THE} Notice of Appeal and a brief shall be filed

1 with the National Transportation Safety Board, Docket
2 Section, 490 L'Enfant Plaza East, SW, Washington, D.C.
3 20594.

4 If no appeal to the Board from either party
5 is received, or if the Board of its own volition does
6 not choose to review the Initial Oral Decision of the
7 Judge within the time allowed, then the Judge's Oral
8 Initial Decision shall become final.

9 Timely filing of such an appeal, however,
10 shall stay the Order as set forth in the Judge's Oral
11 Initial Decision.

12 Off the record.

13 (Discussion off the record.)

14 JUDGE FOWLER: Let the record indicate that
15 Respondent has indicated that he will be filing a
16 Notice of Appeal from the Judge's Oral Initial Decision
17 within the time allowed.

18 I will restate the time~~re~~ parameters. 10
19 days from today's date from the decision, the Notice of
20 Appeal must be filed, and 50 days from today's date, a
21 brief must be filed by the Respondent to further his
22 appeal, setting forth therein his objections to the
23 Judge's Oral Initial Decision.

24 If there's nothing further at this time, I
25 would declare the hearing closed, but before we go off

1 the record, I would like to thank both counsel for the
2 Administrator as well as for the Respondent for being
3 his own counsel during the course of this proceeding,
4 and all the witnesses for their help and assistance and
5 cooperation.

6 Thank you all very much. We stand --

7 MR. KACHALSKY: What's the address?

8 MS. STANFORD: Thank you, Your Honor.

9 JUDGE FOWLER: I'm sorry?

10 MR. KACHALSKY: I need the address to file
11 the Notice of Appeal.

12 JUDGE FOWLER: The address, 490 L'Enfant
13 Plaza, that's L--E-N-F-A-N-T, Plaza East, SW,
14 Washington, D.C. 20594.

15 Ms. Stanford, you may have this back with the
16 exhibits. They will go with the file.

17 Mr. Graber, would you be good enough to
18 return the keys?

19 (Whereupon, the hearing was concluded.)

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Edited
WE Jfr.
10/29/99

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REPORTER'S CERTIFICATE

This is to certify that the attached
proceedings before: NTSB

In the Matter of: ALAN KACHALSKY

were held as herein appears and that this is the
original transcript thereof for the file of the
Department, Commission, Administrative Law Judge
or the Agency.

EXECUTIVE COURT REPORTERS, INC.

1320 Fenwick Lane Suite 702
SILVER SPRING, MARYLAND 20910
(301) 565-0064

Official Reporter

Dated: OCTOBER 7, 1999

1 UNITED STATES OF AMERICA
2 NATIONAL TRANSPORTATION SAFETY BOARD
3 OFFICE OF ADMINISTRATIVE LAW JUDGES
4

5 JANE F. GARVEY,) Docket No. SE-15673
6 Administrator)
7 Federal Aviation Administration,)
8 Complainant,)
9 v.)
10 EUGENE R. MALLETT,)
11 Respondent.)

12
13 TRANSCRIPT OF PROCEEDINGS
14

15 Heard at Courtroom No. 532, Fifth Floor, Federal Building
16 301 South Park St., Helena, Montana
17 October 6, 1999, 9:30 a.m.
18

19 BEFORE THE HONORABLE PATRICK G. GERAGHTY
20

21 PREPARED BY: LAURIE CRUTCHER, RPR
22 COURT REPORTER, NOTARY PUBLIC
23 P.O. BOX 1192
24 HELENA, MT 59624
25 (406) 442-8262

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DECISION AND ORDER

THE COURT: This has been a proceeding before the National Transportation Safety Board on the Appeal of Eugene R. Mallette, herein referred to as Respondent, seeking review of an Order of Suspension which seeks to suspend his Private Pilot's Certificate for period of 270 days. The Order of Suspension serves herein as the Complaint, and was filed on behalf of the Administrator, Federal Aviation Administration, herein the Complainant, through her Regional Counsel of the Northwest Mountain

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1 Region.

2 The matter here has been heard before the
3 Administrative Law Judge, and as provided by the Board's
4 Rules of Practice, I am issuing a bench decision in the
5 proceeding.

6 Following notice to the parties, the matter came
7 on for trial on October 6th, 1999 in Helena, Montana. The
8 Complaint was represented by one of her Staff Counsel, Karl
9 B. Lewis, Esquire, of the Regional Counsel's Office. The
10 Respondent was present at all times and was represented by
11 his Counsel, Robert S. Young, Esquire, of Salt Lake City,
12 Utah.

13 The parties were afforded full opportunity to
14 offer evidence, to call and examine and cross-examine
15 witnesses, and to make argument in support of their
16 respective positions.

17 In discussing the evidence, I will attempt to
18 limit myself to just the highlights, which I believe will
19 illustrate the grounds for the conclusions I reached herein.
20 I have, however, considered all of the evidence, both oral
21 and documentary. The evidence that I don't specifically
22 mention is viewed by me as being essentially collaborative,
23 or is not materially affecting the outcome of the decision.

24 AGREEMENTS

25 By pleading and amendment, and at the

1 commencement of the trial, it was agreed there was no
2 dispute as to the allegations in Paragraphs 1 and 2 of the
3 Complaint. Therefore, those matters are taken as having
4 been established for purposes of this decision.

5 DISCUSSION

6 The Complainant's case is made through numerous
7 Exhibits, thirty in number, and the testimony of several
8 witnesses, and statements that were offered from witnesses
9 who were not present to give verbal testimony today. With
10 respect to the written statements offered as testimony by
11 the Complainant, I have considered those statements in
12 conjunction with the other witnesses' testimony; also the
13 fact that one of them is signed as under penalty of perjury
14 as an affidavit. And looking at the evidence offered by the
15 Complainant's witnesses, since the evidence in the written
16 statements appears essentially consistent with the other, I
17 have attached significant weight to those written
18 statements.

19 Turning then to the testimony of the witnesses
20 who were called. Mr. Alsbury lives at 19 Hilltop Drive.
21 This is one of the areas at which a view was made ~~in~~ this
22 morning. I considered this vantage point at the top of
23 Hilltop Drive as views two and three. In my view, the
24 Hilltop Drive area, that community there, constitutes a
25 congested area. Outside the boundaries of that, those

1 homes, it is sparsely populated. It is also considered, in
2 my view, sparsely populated up towards the quarry. There,
3 however, are vehicles and other structures along that line.
4 Similarly back down which I believe is Jackson Creek Road
5 towards the Interstate, there's a saloon there, and some
6 other structures; and therefore, that is in my view part of
7 the congested area. Looking out towards view one, in my
8 view, that was essentially a combination of elsewhere or
9 anywhere area, and sparsely populated. There were some
10 homes which ~~were~~ off to my right, but they were on a hillside
11 quite some distance away. That essentially really is
12 anywhere area, as far as I'm concerned. However, the area
13 from the Interstate up to the quarry, the homes and such,
14 are a combination, in my view, of congested area and
15 sparsely populated. And I'll discuss the precedent that
16 applies to that subsequently herein.

17 In any event, Mr. Alsbury lives at 19 Hilltop
18 Drive. He was at home working on the roof of his home on
19 the date in question, which is March 13th, 1999. He first
20 heard a loud noise, and then observed an aircraft, which he
21 described as, looking ^{at} C-2, pictures of the aircraft, ~~and~~ he
22 identified as the P-51 Mustang, which admittedly the
23 Respondent was operating on that date, and in that place, in
24 the Respondent's testimony.

25 Mr. Alsbury described observing the aircraft to

1 be diving towards the Jackson Creek Saloon; it leveled off
2 over the Jackson Creek; the aircraft continued along Jackson
3 Creek Road, according to the witness, about to the Montana
4 City Fire Department building, which was part of the
5 structures in the area; and then did what he called an
6 abrupt climb, a roll over, which to me appeared to be like a
7 wing over or a hammer head reversal, turned, and then
8 returned down the same route, that is, along the road, over
9 the saloon again, where it tipped, in his words, or wagged
10 its wings.

11 As to estimate of altitude, he stated that the
12 aircraft as it went by was approximately at his eye level.
13 The contour maps that were offered along with the witness'
14 testimony indicate that the aircraft would have been
15 somewhere approximately 150 to 200 feet above ground level,
16 from what I observed at Hilltop Road and understanding his
17 testimony. The witness also described the aircraft as doing
18 a 360 degree roll around its longitudinal axis, and in his
19 estimate, at the time of the roll the aircraft was about 300
20 to 500 feet above ground level at the time the roll was
21 executed.

22 On cross-examination, he acknowledged knowing of
23 the FAA inspector Mr. Warmoth; however stated he had prior
24 to this never been introduced to that gentleman. With
25 respect to other aircraft coming through the area, he did

1 acknowledge that Delta Airlines and some other aircraft come
2 over that location. However, he also indicated in those
3 altitudes, they come over considerably higher, or not as low
4 as he observed the aircraft on this particular date. He
5 further on cross-examination estimated, when asked by
6 Respondent's Counsel for the horizontal distance from the
7 roof to Jackson Creek Road, he put that at 80 to 100 yards.
8 That's 200 to 300 feet horizontally from him. So the
9 aircraft, according to the witness, would have passed at
10 approximately eye level within 500 feet of his position on
11 the roof of his house, and of course, his buildings and
12 those buildings in his area and the ones that are lower on
13 Hilltop road to him.

14 Mr. McMillan works at the solid waste dump or
15 garbage disposal place in Montana City. He was at the dump
16 site on the date in question. Exhibits C-5 and C-6 were
17 indications of his location, and he drew the flight path on
18 the Exhibits. He heard the aircraft come over, and then
19 again with reference to C-7, described the aircraft passing
20 a sign which is at Papa Ray's Pizza, apparently an
21 advertising sign. He testified that in his view, the
22 aircraft went over the sign at no more than half again as
23 high as that sign, and on cross-examination, said his best
24 estimate that the aircraft was no more than 60 feet to the
25 other side of the sign as the aircraft passed that sign.

1 Mrs. Ellen Bright was a passenger in a pickup
2 truck apparently being driven by her husband. They were
3 either going to visit or returning from a visit to their
4 son, who was working in the Montana City area on the date in
5 question. She testified she heard a loud noise, looked up,
6 and it appeared to her that the aircraft was right in the
7 windshield of their vehicle. She described they were going
8 eastbound just passing over the overpass of the Interstate
9 at the time that this first observation took place.

10 She described the aircraft as -- and I'll string
11 these together -- doing wing wagging; she also described
12 loops; rolling motions; and she said that her exclamation
13 when she saw this was, "Oh, shit," because she thought the
14 airplane was out of control and was going to crash. As to
15 speeds and distances, she eschewed making any of those,
16 saying she wasn't really good at that, but she did say the
17 aircraft was very, very close, and I'm quoting, and going
18 very fast when it was doing its roll, and also describing a
19 sharp pull up with a dive and the roll.

20 On cross-examination, she essentially reiterated
21 her story, and again described what she called wing wagging
22 or tippings, a roll, descending rolls, and a loop,
23 indicating that there were at least two passes.

24 Mr. Trent Pamplin was also working in his house
25 doing landscaping in the front yard, looking north

1 apparently, at 15 Hilltop Drive in Montana City on the date
2 in question. C-11 is an indication ~~of~~ the photograph where
3 his home is located, and he also identified the P-51 by
4 reference to Exhibit C-2. He stated he heard a loud noise
5 like a low flying aircraft. He observed the aircraft then
6 heading towards the gravel pit up Jackson Creek Road. He
7 described an abrupt or steep ascent with a rolling turn back
8 to the east, and then said that the aircraft directly passed
9 over the neighboring house, which was pictorially described
10 and also described verbally by him as being directly across
11 from him. Then according to the witness, the aircraft
12 proceeded down over the saloon on Jackson Creek Road.

13 As to estimate to the height of the aircraft as
14 it passed over the neighbor's house, this witness indicated
15 the aircraft passed over the neighbor's house at about 50 to
16 60 feet. The neighbor's house is shown on Exhibit C-12, and
17 on which is also drawn the flight path by this witness. The
18 witness also stated that the steep climbing turn occurred
19 between 500 and 600 feet. This witness, as Mrs. Bright,
20 also indicated concern for safety because of the speed of
21 the aircraft and the altitude, and manner in which it was
22 being operated.

23 On cross-examination, the witness essentially
24 stuck by his direct testimony, and again described maneuvers
25 as a steep climb, a maneuver with a reversal, that looked to

1 me as he was trying to describe, a hammer head reversal, or
2 a wing over. He also described a wing wagging occurring by
3 the aircraft as it approached the Interstate. He didn't
4 recall seeing a spiral, but he indicated that he would not
5 say that that was incorrect because as he put it, other
6 people may have seen something from different vantage
7 points. As to other aircraft being in the area, he
8 indicates that yes, other aircraft come in and out of there,
9 but that, as he put it, they were probably at least 2500
10 feet when they passed over the area.

11 Mrs. Goodwin was in her house vacuuming along
12 with her two children. She heard a loud noise, said it was
13 loud enough that she heard it over the vacuum that she was
14 using. She went outside, didn't see anything; went back in
15 the house, and then heard the noise again, and this time she
16 and her two children went out on the deck of their house.
17 C-13 is a photograph of the house. She identified C-2 as
18 the aircraft she saw. C-14 is a photo of her house again
19 with a deck. And while standing there, according to the
20 witness' testimony, she was able to observe the aircraft to
21 come, as it made a pass, to pass directly over her and her
22 children as she was standing on her deck. So she describes
23 the aircraft as passing directly over her deck. Her house
24 is located at 25 Jackson Creek Road, which is further down
25 Hilltop Drive, or at the bottom of the drive essentially.

1 She estimated the height of the aircraft as no higher than
2 the houses on the top of Hilltop Road behind her, and again
3 stated that the aircraft went directly over her since when
4 she looked up, she could see the bottom of the aircraft as
5 it went by. She also expressed the opinion that she felt it
6 was unsafe operation by the pilot, "irresponsible" as she
7 put it, stating that if something had happened at the
8 position she saw the aircraft in, and I quote, "We would
9 have been toast."

10 On cross-examination, she did sponsor R-1.
11 However, looking at her statement, I don't see her statement
12 detracts anything from her testimony as given in Court
13 today.

14 With respect to contact with the FAA Inspector,
15 she did indicate that the Inspector had come by and asked
16 for a written statement. However, she denied that the
17 Inspector ever suggested to her what she should put in the
18 statement, with low flying aircraft or aerobatics.

19 And here I would simply interject. It does
20 appear that Mr. Warmoth did contact all these witnesses.
21 That was his job. It was his area, as he testified to it,
22 and that's not contradicted. There was a phone call,
23 apparently some complaints, two or three, and he went out to
24 investigate. According to Ms. Goodwin, he showed his
25 credentials, there's no question that he identified himself,

1 and I will assume that he did the same to all these others.
2 There's no indication that he didn't. The fact that he may
3 have asked these people, "Are you aware of any incident of a
4 low flying aircraft on the date in question?," or "Did you
5 see anything unusual?," even using the term "aerobatics," I
6 don't find in any way detracts from his investigation. I
7 think that would be a normal part of an investigation. "Did
8 you observe the crash that occurred in the intersection of
9 First and Main on April 1?" You need to identify something
10 that you're asking them about. I think asking if they saw a
11 low flying aircraft or if they saw unusual maneuvers is
12 simply, "Did you see something like this?"

13 I don't take it as being suggestive of anything
14 else. The burden of proof to show collusion on the part of
15 the witnesses, or unwarranted suggestion on the part of the
16 FAA inspector, or bias against the Respondent is a burden on
17 the Respondent to show that. In my view, the evidence does
18 not show any bias on the part of these witnesses; it does
19 not show any effort to -- collusion between them, that they
20 got together and made these statements; nor do I find
21 there's been any showing that any part of the investigation
22 in some way taints the evidence in this case. It's just not
23 there, and I make that specific finding.

24 Mr. David Brown was at his place of business at
25 the True Green Chem Lawn building, which is along Jackson

1 Creek Road and the intersection of Highway 282. He
2 identified that on C-15. He identified power lines that run
3 perpendicular to Highway 282. And with respect to what he
4 observed on that date, he says he saw the aircraft fly by
5 while he was still inside his building. This intrigued him
6 enough that he ran outside, and he said he saw this aircraft
7 do a sharp bank back, and then come back past his building
8 wagging wings. Mr. Brown said he thought possibly the pilot
9 was trying to say hello, or saw him standing outside the
10 building. According to Mr. Brown, the airplane was low
11 enough and close enough that he could see the pilot inside
12 the bubble cockpit. He identified the aircraft as being the
13 P-51, looking at Exhibit C-2.

14 He also described a portion of the flight by
15 saying that the aircraft while over the quarry did an abrupt
16 climb with a reverse descent, descending down, and then
17 flying very fast, "amazingly fast," as he stated it, "with
18 the wing wagging right in front of me." Altitude over the
19 Jackson Creek Saloon, which was between him and the saloon,
20 he said it was low, and that when it passed over the power
21 lines, was no more than 50 feet over the power lines. He
22 thought again a concern for safety, because if the pilot
23 hadn't been aware of the power lines or didn't see them in
24 time, that the aircraft was low enough that it possibly
25 could strike the power lines, and then it would end up, as

1 he stated, "with a fire ball on the interstate."

2 On cross, he used the model aircraft, as the
3 other witnesses did, and described -- tried to show sharp
4 climbs and turns. He agreed that he did not recall seeing
5 any spirals, but he also said that they could have been seen
6 by someone else from another vantage point.

7 Mr. Fogelstrom is the manager of the Helena
8 Tower. He testified with respect to the dimensions of Class
9 D and Class E air space. Class D air space is a five mile
10 radius from the center of the Helena airport, and it goes to
11 the surface. Class E air space extends outward from that,
12 and extends upward from 1200 feet above the surface. He
13 also described two Victor airways as being within the Class
14 D air space; the floor, of course, of the Victor airways
15 within the Class D air space being on the surface, and the
16 floor of the Victor airways in Class E air space being 700
17 feet AGL.

18 With respect to the distance from the airport to
19 the intersection of Jackson Creek Road and Frontage Road, he
20 stated he was aware of that. Taking it from the
21 geographical center at Helena airport, he put that as 4.8
22 miles, and then using an internet mapping service maintained
23 by the State of Montana, came out with 4.75 miles.

24 On cross-examination, he reiterated the position
25 that in his view, the intersection that I've referred to was

1 clearly within Class D air space. With respect to an
2 emergency of loss of communication or no communication with
3 the tower within Class D air space, that the pilot cannot
4 enter Class D air space, but must go elsewhere and land. If
5 he wants, he can use light signals. He needs to call that
6 facility, and make arrangements to penetrate the Class D air
7 space for landing with that particular facility. Class D
8 air space is described in the FAR 91.129, and Class D air
9 says, as I read Subsection C, "Each person operating an
10 aircraft in Class D air space must meet the following two
11 way radio communications," and then it goes on to arrival.
12 So use of the radio is mandatory as stated by Mr.
13 Fogelstrom.

14 If the aircraft was almost out of fuel, that
15 would be an emergency and possibly excuse the entry into
16 Class D air space, but that's not case here. So I accept
17 the testimony of Mr. Fogelstrom that Class D air space does
18 require, as the regulation states, two way communication
19 before you can penetrate.

20 Mr. Warmoth is the inspector who investigated
21 for the FAA. He sponsored in his testimony two written
22 statements, one of which by Mrs. Puckett, to which is
23 attached ~~the~~^a map. In her statement, she depicts the flight
24 path that she observed, two passes again along Jackson Creek
25 Road. She identifies the aircraft that she saw, low, fast,

1 over the subdivision twice, and identifying it; her son
2 indicating it was a P-51 Mustang.

3 Mr. Barham works at the Jackson Creek Saloon.
4 He was on duty at that date in question. He says he
5 witnessed a World War II military fighter approach from the
6 east, pass over the wires, as testified to by Mr. Brown;
7 at no more than an altitude of 25 to 50 feet, again
8 consistent with Mr. Brown. There is a photograph attached
9 showing the view that he had out of the window from where he
10 was working. His estimate of the altitudes is based upon
11 his limited view from his work position, as depicted in the
12 photograph.

13 One other written statement bears discussion,
14 that is Exhibit C-10, which is the written statement of
15 Darrell Bright, who is now apparently in the military out in
16 Johnson Islands in the South Pacific. He was working in
17 that area on the date in question. He described the
18 aircraft as coming over the saloon at about 50 to 100 feet,
19 which was over his head, since they were working on the roof
20 of that saloon. He says several minutes later, the airplane
21 returned east bound, extremely fast speed, the two passes
22 that he witnessed. He indicates he also saw different types
23 of radical aerial maneuvers such as rolls, twists, the
24 aircraft flying almost straight up, and then all of a sudden
25 twisting and spiraling downwards, leveling out at a low

1 altitude, essentially consistent with the testimony I've
2 already reviewed.

3 Mr. Warmoth also testified that taking a GPS
4 reading at the center of the airport and also at the
5 intersection indicating on GPS that their reading was 4.6 to
6 4.8 miles, again indicating, as I said, within the Class D
7 air space.

8 Ultimately he was of the opinion that based upon
9 all of the evidence that he heard during the day in court,
10 and in the statements, that the regulatory violations
11 charged have all been established.

12 Respondent testified in his own behalf. He is
13 the CEO of Alpine Air, has held that since 1986. He's not
14 the owner of the P-51 -- that's owned by CLB Corporation.
15 However, the Respondent routinely pilots that aircraft. He
16 concedes, has admitted, that he was flying the aircraft on
17 the date in question in the vicinity of Jackson Creek Road
18 and Frontage Road, having departed from Butte, Montana. In
19 his testimony, as he approached Helena, he was not able to
20 contact either approach control or the tower at Helena,
21 although he tried four or five times, stating he could
22 receive, that he could hear other aircraft, but apparently
23 he was not able to transmit. He admits that he flew down
24 over Jackson Creek Road. However, at the time that he was
25 performing in that area, he considered that he was having an

1 emergency since he was unable to receive any voice
2 communications. He states also that he was below 500 feet,
3 was not paying attention to the altimeter, or at least could
4 not reference the altimeter, stating he was trying to stay
5 below the ridge line because he was aware that other
6 aircraft could depart or arrive over that ridge line.

7 He denied seeing anyone on the ground, and he
8 denied ever wagglng his wings. He denies doing any roll at
9 any time during his flight in that area; denies doing any
10 spirals; denies doing any abrupt or 90 degree angle type
11 climb configurations; essentially denies making any of the
12 maneuvers as I've already described as given in the
13 testimony of the other witnesses.

14 In his view, he never endangered any lives on
15 the ground, stating that if an engine in the aircraft had
16 failed, that from his training, he would have been able to
17 do a quick punch up to 1400 feet, bleed off air speed, and
18 then commence best glide at 175 miles per hour, stating that
19 with that altitude, and maintaining that air speed, that he
20 would be able to glide 5.35 miles, essentially make it at
21 least to the Helena airport.

22 In his opinion, as he stated, he never performed
23 any aerobatic maneuvers, although indicated that he never
24 felt he was below 500 feet, but could not say the exact
25 altitude; indicating further that measuring the distance

1 from the Helena airport to the area of Jackson Creek Road
2 and Frontage, doing it twice in two different vehicles, that
3 he measured the distance as being 5.8, and therefore in his
4 view, he was outside the Class D air space.

5 On cross-examination, he denies that in any
6 conversation with Inspector Warmoth that he described an
7 abrupt ascending maneuvers, but conceded he may have told
8 the inspector that he had performed a wing over.

9 Mr. George Goris is an avionics expert, I would
10 take it, based upon his description of his past experience.
11 He testified in support of R-4, and also that repairs were
12 made to Respondent's aircraft with respect to replacing the
13 intercom, some replacement of the mike by whoever
14 manufactured that, and putting in new switches. He concedes
15 that there were a Com 1 and Com 2, and Com 2 apparently
16 would work; however, he indicates also the microphone could
17 have been working intermittently. So I take it there is
18 evidence in front of me that is not rebutted by the
19 Complainant that there is, in my view, at least some
20 evidence that the radios have been worked on, that there
21 would be a possibility of lack of communication from the
22 tower back to the aircraft; and based on the evidence and
23 balancing it out, I think the preponderance of the evidence
24 does support that the Respondent did experience
25 communications failure or difficulty at the time and place

1 as he alleges, and I make that finding on the evidence.

2 That to me is the pertinent evidence in the
3 case. The evidence, of course, has to be viewed as to
4 whether it supports the allegations in the ~~Complaints~~ by a
5 preponderance of the reliable and probative evidence. That
6 burden rests with the Complainant. However, as I've already
7 indicated, I've made a determination that as to the
8 allegations by Respondent of collusion and bias or improper
9 investigation, that is not supported on the evidence in
10 front of me.

11 As to credibility of the witnesses, these
12 witnesses, I have listened to their testimony carefully,
13 because I felt that there would be a question as to veracity
14 or credibility, if you will, a weight of the testimony
15 offered by the witnesses. I find that the witnesses
16 appeared credible to me. These are witnesses that haven't
17 been shown by any evidence in front of me to have any
18 personal aspect with the Respondent, no showing of bias, or
19 any indication that they even know him, or that there is any
20 activity on their part that they got together to concoct
21 some sort of story. However, listening to their testimony
22 and the description of what they saw, I have listened
23 carefully to what they've said, and taken into account that
24 these witnesses, the majority of them, in fact almost all of
25 them, if not all, are not pilots. Most of them have no

1 aviation experience other than possibly being passengers in
2 an aircraft. So I take that as a factor to be considered.

3 I've also listened to the descriptions of the
4 maneuvers, and where maneuvers are not supported by more
5 than one or two witnesses, I have discarded that testimony.
6 I have accepted as valid descriptions of the maneuvers based
7 upon essentially lay testimony those maneuvers which are
8 supported by the majority of the witnesses' testimony. I
9 therefore do find that there is a description clearly of
10 abrupt pull ups, low flight, wing wagging, and abrupt
11 reversals, also essentially like a wing over or a hammer
12 head reversal like one might make in an agricultural
13 spraying operation. I find those are clearly supported by a
14 preponderance of the reliable and probative evidence.
15 Testimony as to loops or spirals, although both Mrs. Bright
16 her son described those, I'm not convinced that there is
17 sufficient evidence to say spirals or loops were done.
18 However, there is testimony as to the rolls, the wing
19 wagging, the reversals, the high speed passes, and the
20 altitudes, and I accept those as being clearly established
21 by the preponderance of the evidence.

22 With respect to the exercise of an emergency in
23 this case, ^{Section} 91.3 allows one to deviate from the ~~the~~ regulations
24 to the extent to take care of the emergency. In this case,
25 the maneuvers as described, and as I accept on the

1 preponderance of the testimony, were not maneuvers necessary
2 to accommodate a communications failure. These were
3 intentional aerobatic maneuvers, in my view. The maneuvers
4 as described by these witnesses were aerobatic maneuvers,
5 and I'll discuss that in a little more detail subsequently.
6 But in any event, the radio failure, while it would be an
7 emergency, is not an emergency of the type that would excuse
8 the activities that I find occurred at the intersection --
9 or along Jackson Creek Road and the intersection of Highway
10 282 and up to the quarry and over Hilltop Drive.

11 As to the area of Hilltop Drive, I already
12 described that. That is a congested area. Jackson Creek
13 Road is a congested area within the meaning and intent of
14 the Regulations. As the Board has pointed out, the mere
15 fact that you are attempting to land or to take off doesn't
16 mean that you can operate below prescribed altitudes. It
17 has to be necessary for takeoff or landing. In my view,
18 none of these maneuvers as described by the witnesses were
19 necessary for the purpose of landing at Helena airport. So
20 that does not come within the exception of Section
21 91.119(a), and I so find.

22 With respect again to the congested area, it's
23 true it is not specifically defined in the Regulations other
24 than to say congested area. However, there are numerous
25 Board decisions on this point which have been affirmed by

1 various Courts of Appeals. The Board has found congested
2 areas based upon structures in the area, the assemblages of
3 persons, all these things to be determining as to whether
4 it's congested. As I said, the Hilltop Drive area is a
5 sufficient community of homes, residential areas, and other
6 structures along the highway. In my view, this falls within
7 the definition of a congested area. The Board has held
8 congested areas to be congested where the areas are small
9 enough to be less than a mile in length or a mile in width.
10 Also congested areas are considered, and the Board has found
11 them, to be small residential areas, or congested areas of
12 cities, towns, or settlements, because the Regulation is
13 designed to protect small communities as well as large
14 metropolitan areas, and the Board has so held.

15 Further, that the mere fact that a safe landing
16 can be made from any point over an area does not necessarily
17 mean that the area is not congested, and in my view, the
18 aircraft being operated as described by Mr. Brown as fifty
19 feet passing over wires, as Mr. Barham said 25 to 50 feet,
20 again it's not whether something could be done, it's whether
21 that action constitutes undue hazard. The Administrator
22 doesn't have to show it would be impossible for the
23 Respondent to make an emergency landing without injury or
24 damage to persons on the surface in the event an engine
25 fails. He only has to show that an emergency landing from

1 the altitude the Respondent passed through presents an
2 unreasonable risk, or an undue risk of such harm, and that
3 goes back a long way. It goes to 3 NTSB 3111, which is the
4 Michaelson case, and of course, it also goes back even to
5 CAB Regulations and decisions.

6 So I find in this case that in my view, the
7 evidence by a clear preponderance of the evidence does
8 establish that there was violation of Section 91.119(b), and
9 that the Respondent did operate his aircraft over a
10 congested area of a town or settlement at less than 1,000
11 feet over the highest obstacle within the horizontal radius
12 of 2,000 feet of the aircraft. That is, in my view, clearly
13 established by the testimony of the witnesses that were in
14 the Hilltop area and along Jackson Creek Road on the date in
15 question.

16 I further find that the violation of Section
17 91.119(c) is established, in that the aircraft passing up
18 Jackson Creek Road going up towards the quarry, to me, that
19 was at least sparsely populated along that area, and I
20 therefore find that coming back down, and then past where
21 Mr. Brown was with Chem Lawn, the saloon, they're not
22 residential homes in that area, as I observed it, but it is
23 still sparsely populated. There were people there. There
24 are structures there. There were people on the roof. So I
25 find that violation is established.

1 With respect to Section 91.119(a), as I've
2 already stated, the maneuvers were not necessary for
3 landing, and in my view, as I've already cited in the
4 Michaelson case, it is sufficient to show that passing
5 through an area and over structures, that passing through
6 that area presents an unreasonable risk of such harm.
7 That's the nature of an emergency. One doesn't know what's
8 going to occur, or what at point it might occur. In my
9 view, the high speed passes at those altitudes, although one
10 do could a pop up possibly, again that's the best case, but
11 that's not the issue in front of me. Did the action present
12 a hazard unduly to the people or structures on the surface?
13 I find that it did. I find that violation established.

14 Turning then to the aerobatic flight. Again,
15 the term aerobatics is not defined in the Regulation.
16 However, the Regulation, in my view, is at least clear
17 enough in respect to the fact it says, "Abrupt changes in
18 aircraft altitude, abnormal altitude, or abnormal
19 acceleration." Maneuvers not necessary for normal flight.
20 The maneuvers described by the witnesses, which I do credit,
21 are not maneuvers that were required for normal flight. And
22 I again disregard spirals or loops. I don't consider those
23 as having been established. But high speed low passes,
24 abrupt pull ups as described, roll, wing wagging, those are
25 not necessary for normal flight. They also described

1 changes in air speed, accelerating climbing up, decelerating
2 coming down, and accelerating again. I therefore find that
3 aerobatic maneuvers were in fact being performed. I
4 therefore find that a violation of 91.303(a) is established,
5 in that the aircraft was operating an aerobatic flight over
6 a congested area of a town or settlement, however you want
7 to consider that particular area.

8 I've listened to the testimony with respect to
9 the extent of the Class D air space and the Victor airways
10 in the area. In my view, the more probative evidence and
11 more reliable evidence is that the area is within the Class
12 D air space. Driving the distance twice and measuring it
13 by the odometer is not sufficient to rebut locations as
14 testified to by Mr. Fogelstrom, who is the manager of the
15 tower. With respect to the geographical, he knew the exact
16 position of the geographical center of the airport,
17 measuring it in a straight line, GPS measurement, and also
18 measurement on the computer. I find that is more probative
19 than the testimony offered by the Respondent, so I find the
20 operation was within Class D air space. However, it was
21 barely within Class D air space. So although I do find a
22 violation of entering Class D air space, and a violation of
23 91.129(c)(1), I find it essentially a technical or de minimus
24 violation.

25 Coming back then to the aerobatic flight with

1 respect to the federal Airway, the federal Airway also is
2 within the Class D air space, goes down to the surface.
3 Outside that, there is testimony that the aircraft was at
4 700 feet, so I find that there is testimony to support the
5 finding of violation of Section 91.303(d), and I so find. I
6 again, however, because of the narrowness of the area, as
7 discussed, 4.75 or 4.8, as opposed to five nautical miles,
8 again, this is really essentially a deminimus, in my view,
9 violation. However, it is nonetheless a violation.

10 Finally, with respect to aerobatic flight, a
11 violation of section 91.303(e) is established, in that these
12 maneuvers clearly took place below 1500 feet AGL, and
13 therefore on a preponderance of the evidence, the violation
14 is established.

15 Turning then to the charge of the violation of
16 91.113(a), operation in a careless or reckless manner so as
17 to endanger the life or property of others, Paragraph 9 of
18 the Complaint charges reckless endangerment. The Board has
19 held, and the Court of Appeals has sustained, the
20 differentiation between careless and reckless as being one
21 of intent. Careless is simply being negligent. Something
22 happens. You're not paying attention. Recklessness equates
23 with intent. These maneuvers were intentional. The
24 aircraft didn't do it spontaneously. The reversals, wing
25 wagging and such, are maneuvers requiring inputs from the

1 pilot. The altitude flown has to be also controlled by the
2 pilot, and no indication the aircraft was out of control and
3 came into altitudes. A potential hazard is sufficient.
4 Twenty to fifty feet over power lines is potentially
5 hazardous. If something happens, the pilot doesn't see the
6 power lines, or something happens before you get there that
7 you don't clear the lines, you can hit them. Similarly, if
8 something really untoward happens, the possibility of other
9 damage to structures or people on the surface. There is a
10 sufficient nexus.

11 I find therefore that a violation of 91.113(a)
12 is established, and that the intentional actions of the
13 Respondent at least potentially endangered the life or
14 property of others, and that he did so intentionally, and
15 therefore in a reckless manner, and I so hold.

16 Turning then to sanction. Deference is to be
17 shown to the choice of sanction made by the Administrator.
18 That is under the Amendments to the Federal Aviation Act.
19 However, one does not have to slavishly follow that. As
20 I've indicated, in my view, at least the violations with
21 respect to the Federal Airway and operation in Class D air
22 space are deminimus, and I've taken that into account in
23 viewing the appropriate sanction, which in my view should
24 act as a deterrent, and to satisfy the public interest in
25 air safety and air commerce in transportation.

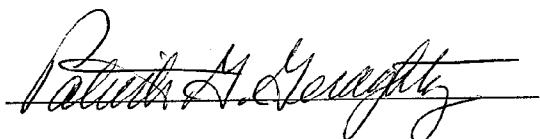
1 That having been said, I look at the violation,
2 the fact that there were at least two passes, a low
3 altitude, the intentional portion of it, and I find that
4 making allowance for the deminimus portion of this, that it
5 would be an adequate sanction to satisfy the interest I've
6 already stated, to modify the order to provide for a period
7 of suspension of 230 days, and with that modification, I
8 will affirm the Administrator's Order, the Complaint herein.

9 It is therefore adjudged and ordered that:

10 (1) The Complaint, the Order of Suspension be,
11 and the same hereby is modified to provide for a period of
12 suspension of the Respondent's Private Pilot Certificate for
13 a period of 230 days.

14 (2) That the Order of Suspension, the Complaint
15 herein, as modified be, and the same hereby is affirmed.

16 Entered this 6th day of October, 1999 at Helena,
17 Montana.

18 
19 PATRICK G. Geraghty, Judge
20 *dated 11/4/99*

APPEAL

THE COURT: Do you need the appeal provisions?

MR. YOUNG: No.

THE COURT: Do you waive the appeal?

MR. YOUNG: I will.

THE COURT: Show that the appeal provision has
been waived as to reading.

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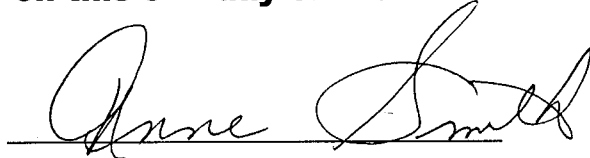
1 THE COURT: Anything else for the record?
2 MR. LEWIS: Nothing.
3 MR. YOUNG: Your Honor, just so we're clear,
4 only FAA waived the appeal. You weren't suggesting that we
5 waived our appeal?
6 THE COURT: No, waiving of the reading of the
7 appeal provisions.
8 MR. LEWIS: I wasn't waiving the appeal either,
9 just the reading.
10 THE COURT: I'm not asking you to waive the
11 appeal.
12 MR. YOUNG: I got you. We're set.
13 THE COURT: Do you want me to read the --
14 MR. YOUNG: No, I know what the appeal
15 provisions are. I just understood you were saying somebody
16 was waiving their appeal rights.
17 THE COURT: No, waiving the reading of the
18 appeal provisions. Your right to appeal is yours.
19 MR. YOUNG: Thank you.
20 THE COURT: The hearing is adjourned.

21 (The proceedings were
22 concluded at 5:20 p.m.)

23 * * * * *

CERTIFICATE OF SERVICE

This is to certify that a copy of the Oral Initial Decision and Order which was signed and edited on November 4, 1999, by the officiating Judge in this case, was mailed to the appropriate parties and/or their attorneys on this 9th day of November 1999.

A handwritten signature in cursive script, appearing to read "Anne Smith", written over a horizontal line.

**ANNE SMITH
Paralegal Spec./Hearings Asst.
Circuit III, PATRICK G. GERAGHTY
Administrative Law Judge
Denver, Colorado**

**EUGENE R. MALLETT
SE-15673**

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96X

SERVED OCTOBER 13, 1999

**UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES**

JANE F. GARVEY
Administrator
Federal Aviation Administration,

Complainant,

v.

RICK E. GARDNER,

Respondent.

Docket No.: SE-15545

**SERVICE: FAX & REGULAR MAIL TO COMPLAINANT;
CERTIFIED MAIL, RRR, TO RESPONDENT**

JOHN J. CALLAHAN, ESQ.
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MR. RICK E. GARDNER
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MARION, IN 46952

DECISIONAL ORDER

This matter is before the National Transportation Safety Board (the Board) on the Appeal of Rick E. Gardner (Respondent) for review of the Order of Revocation issued against Respondent's Mechanic Certificate by the Administrator, Federal Aviation Administration (FAA), the Complainant herein. That Order serves as the Complaint in the proceeding.

The matter was, pursuant to Order, conducted as a bifurcated proceeding with sessions held in Portland, Oregon on May 19, 1999, and thereafter in Indianapolis, Indiana on August 24, 1999.

The Complainant was represented throughout by her Staff Counsel John J. Callahan, Esq. The Respondent attended only the second session and was represented at that time by his Counsel, Harry A. Wilson, Esq. Parties have had full opportunity to present evidence, examine witnesses and to make argument in support of their respective positions.

DISCUSSION

Complainant seeks to revoke Respondent's Mechanic Certificate, Airframe and Powerplant Ratings, charging that Respondent has acted in regulatory violation of Sections 43.13(a) and (b), Federal Aviation Regulations.¹ In support thereof, the Complaint alleges:

1. At all times hereto, you were and are the holder of Mechanic Certificate No. 314622455 with Airframe and Powerplant Ratings.
2. On or about April 21, 1994, you performed maintenance and alterations on Civil Aircraft N154TL, a UH-1E Helicopter.

¹ Section 43.13 provides, as pertinent:

Section 43.13(a), in that when performing maintenance, alteration or preventive maintenance required by Part 91 of the Federal Aviation Regulations, you failed to use the methods, techniques, and practices prescribed in the current manufacturers' maintenance manual or instructions for continued airworthiness or other methods, techniques, and practices acceptable to the Administrator.

Section 43.13(b), in that you performed maintenance, alteration or preventive maintenance and failed to do the work in such a manner and to use materials of such a quality that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on was at least equal to its original or properly altered condition.

3. At the time of said inspection, you failed to use the methods, techniques and practices prescribed in the manufacturer's maintenance manual or otherwise acceptable to the Administrator in that:
 - a. You altered the forward engine bulkhead by adding an unapproved part.
 - b. you improperly attached the forward engine bulkhead to the flange of the engine bellmouth assembly.
 - c. You installed the engine mount fittings when the mounting bolt holes had been damaged (elongated) by improper drilling.
 - d. You installed a damaged right hand upper tail boom mount fitting which had an improperly drilled tail boom mount bolt hole.
 - e. You installed countersunk rivets into two incorrectly located holes in the right hand beam cap and thereafter, ground the nails flush with the beam cap surface.
 - f. You installed an upper left hand tail boom mount fitting which contained unauthorized, oversized, mounting holes and an unauthorized steel busing pressed into its engine mount bolt hole.
4. As a result of the maintenance and repairs described above, you did not do the work in such a manner that the condition of the aircraft was in its original or properly altered condition.

In his Answer, Respondent admitted the validity of the allegations of Paragraphs 1 and 2 of the Complaint.

At the first session, the Complainant presented her case-in-chief through three (3) witnesses and several exhibits.

Paul Matero holds a Mechanic Certificate A & P Rating and, in addition, holds pilot certifications with about 6,000 hours flight time in helicopters. He has been employed in helicopter maintenance and in the course of such work in 1996 worked on N154TL when the aircraft was brought in to the company where he was then employed. At that time he became involved in the disassembly, sheet metal repair, and inspection of the aircraft.

In his testimony, Mr. Matero detailed the various discrepancies revealed during the work on and inspection of N154TL. Those discrepancies, which he stated he observed, included cracks in various fittings; wrong type rivets; misdrilled holes; rivets of the incorrect length; attachment holes with no rivets in place; crack and movement in the tail boom mount. The witness's testimony was supported by photos of the charged discrepancies, Exhibits C-1 to C-5; C-7. The witness testified that none of the work performed by him could have caused the defects and specifically that during the 1996 work, no drilling had been performed. In summary, based upon the discrepancies, he testified existed—particularly to beam caps and engine mounts—he opined the aircraft had had non-standard work previously performed and in its condition was unairworthy as it was just a matter of time until the aircraft would have experienced structural failure.

James Crawford is the owner of Helicopter N154TL and was Respondent's employer at the time Respondent performed work on the aircraft consisting of major repairs and alterations. The witness, on his testimony, holds pilot certification and also is certified as an A & P Mechanic. The witness sponsored Exhibit C-9, the maintenance log of N154TL, which depicts the work done by Respondent. Crawford stated that although he was not present at all times during Respondent's work, nevertheless, he did visit the work site several times a week during the course of the repair work.

The witness discussed a visit to the work site by a Mr. Hicks, an FAA Maintenance Inspector, stating that at the time of Mr. Hicks' visit, the aircraft was in a disassembled condition and, particularly, neither the beam caps nor the engine mounts had as yet been installed.

Crawford testified that he was present during the 1996 work described by Mr. Matero and that he, Crawford, agreed with Matero's testimony as to the discrepancies found at that time, emphasizing that the problems found were "hidden damage," thus not visible until the 1996 disassembly. The witness discussed the discrepancies, expressing his opinion that Respondent's work on the aircraft's beam caps had rendered the aircraft unairworthy. Finally, referencing the areas of the beam caps, engine mounts, tail boom attachment fittings, the witness testified that no repairs had been performed in those areas subsequent to the time Respondent completed his work on the aircraft.

Robert Bilak is employed by the FAA as a Principal Maintenance Inspector, holds pilot certificates, A & P Mechanic certification, and has worked in aviation since 1957, and was the investigating Inspector for FAA. The witness stated that he had reviewed the Exhibits and the various aircraft parts exhibited as demonstrative evidence—those parts were also available at the second session.

The witness discussed the structural repair manual, C-6, as pertaining to the aircraft bulkhead and tail boom attachments, pointing out cautionary instructions contained therein concerning drilling of rivets and avoidance of causing elongation of holes or damage to fittings. Balik then opined, based on the manual instructions and his review of the aircraft parts, that Respondent had failed to follow proper methods, techniques and practices when working on those parts. In sum, the witness expressed the opinion that the work Respondent performed did not return the aircraft to an acceptable original condition; Respondent failed to follow acceptable techniques and practices so that, ultimately, at the conclusion of Respondent's repair work, the aircraft, was in an unairworthy condition.

Respondent offered, as expert testimony, the testimony of Mr. R. Thayer.² The witness holds both an Airframe and Powerplant Mechanic Certificate and an Inspection Authorization, held since about 1971.

The witness testified as to the conduct of an annual inspection, as related to inspection of fittings, e.g., tail boom attachment fittings, stating that an annual inspection would include inspection of such fittings. The same general position was expressed as related to the conduct of a 100-hour inspection of a helicopter. He opined that if such inspections revealed a crack in any attachment fitting for the tail cone, the aircraft would or should be grounded.

On cross-examination, the witness was shown various of Complainant's Exhibits and asked to comment. For example, when shown Exhibit C-1 (pilot's upper right hand tail boom attachment), Mr. Thayer agreed that the part exhibited an elongated,

² Mr. Thayer's testimony was received by means of a video deposition and transcript thereof. Ex. R-25, 25A.

misdrilled hole and a crack, deeming the part unairworthy. The witness was of the opinion the misdrilled hole would not have been caused by stress to the aircraft and, further, that the misdrilled condition would not be visible to a person conducting either 100-hour or an annual inspection. Similarly, upon viewing Exhibit C-3, he agreed that the part revealed over-drilled holes, use of an improper fastener and sealant to fill up the hole.

The Respondent testified on his behalf, indicating first his experience in aviation maintenance began in 1974 in the U. S. Army where he spent about seven years and attended Aviation Maintenance School. He obtained his A & P Mechanic Certificate in 1981 and an Inspection Authorization in 1993.

In his direct testimony, he was shown Exhibits C-1, C-2, and he then stated he agreed that the part did show both a crack and misdrilled holes. He denied, however, that at the time he placed the attachment fitting on the aircraft that a crack or misdrilled holes existed. He also denied that he had utilized a bushing when replacing the part shown in Exhibit C-3, stating that, although as shown in C-3, the part is not serviceable, the part was in serviceable condition at the time, 1994, when he did the work. Similarly, Respondent denied doing any drilling on the tail boom attachment as seen in Exhibit C-4, stating the part was serviceable when he placed it in the aircraft. In sum, therefore, he denied performing any drilling on any of the four fittings, and additional testimony by Respondent was given in respect to the parts as seen in Exhibits C-5 and C-7, and further denying that he had performed any work as seen in Exhibit C-10.

Respondent maintained that his work had been inspected by a Mr. Hicks of the FAA, who had visited the work site on two occasions. That testimony was supported by that of Respondent's wife, who also testified that Mr. Hicks had been present to inspect the work while in progress and upon completion.

A stipulation was received as to use of the aircraft after Respondent had completed his work and there was testimony that the aircraft had accumulated about 750 hours' use from that time until the alleged discrepancies were discovered. Respondent expressed the opinion that over-stressing of the aircraft by picking up too-heavy-a-loads by sling would be the cause of tail boom problems. Finally, by reference to Exhibit R-23,

he pointed to maintenance work performed on the aircraft subsequent to the completion of his repairs. Specifically, Respondent referenced four (4) maintenance entries: (1) 7/7/95, bi-pod engine mount cracked and replaced—Respondent opined that force to crack this mount would fracture the fitting beneath it; (2) 10/16/95, bi-pod engine mount bolts loose—tighten; (3) 1/8/95, tightening of loose bolts; (4) 1/10/95, replacement of hi-locs top left hand tail boom attachment.

On cross-examination, Respondent conceded, in agreement with Mr. Thayer, that in performance of annual or 100-hour inspections, tail boom fittings are not required to be removed, in which case none of the rivets, fasteners would be removed. Upon viewing Exhibits C-1 and C-2, Respondent agreed a misdrilled hole was present and as the hole does not extend past the edge of the fastener, with the fitting installed, the misdrilled hole would not be visible on an inspection. Referencing Exhibit C-3, Respondent conceded that subsequent to an entry in 1989 documenting removal and replacement of a bolt, the maintenance records do not show entries other than Respondent's for work on the tail boom attachments.

Respondent testified that the fittings he used were not fabricated by him; however, he admitted that he drilled the holes. Again referencing the maintenance logs, Respondent agreed that the records do not indicate that subsequent to his 1994 work that the tail boom or its attachment fittings had been removed, arguing, however, as noted above, that the bolts were being repeatedly tightened.

Discussing the return to service of the aircraft following his work, Respondent's position was that Mr. Hicks returned the aircraft to service by means of the Form 337, Exhibit C-12. Respondent testified that after he had signed the Form 337, the document was taken by Mr. Hicks. Respondent acknowledged, however, that the Form 337 does not reflect any entry in the Item Block 7, approval for return to service.

Robert Bilak was recalled by Complainant as rebuttal witness and sponsored Exhibits C-14 and C-15, which are records of his effort to contact Mr. Hicks concerning Mr. Hicks' alleged approval of return to service. In Exhibit C-14, Mr. Hicks states that he told the mechanic—Respondent—that he, Mr. Hicks, never field-approved a major repair and would not do so for this repair. Mr. Hicks further stated that he had

never issued a field approval for a major repair. Although Mr. Hicks' recorded testimony was received as hearsay, I attach significant weight thereto as Mr. Hicks' statement as never issuing a field-approval was supported by the further testimony of Robert Bilak and Exhibit C-15. That Exhibit is a printout of field work records of Mr. Hicks as contained in the FAA's Program Tacking and Recording System (PTRS). As seen from the Exhibit and Balik's testimony, Hicks' PTRS record does not reflect any PTRS entry by Hicks for a field approval.

The foregoing is my view of the pertinent evidence presented; however, it is noted that the entire record has been reviewed and considered and that such evidence not specifically discussed is viewed as supportive or not materially influencing the outcome.

The burden of proof in the proceeding is imposed upon Complainant and to sustain such must establish the allegations by a preponderance of the reliable and probative evidence. Those factual allegations are those cited in the Subparagraphs of Paragraph 3 of the Complaint. The specifics of those charges impact the resolution herein. Subparagraphs (a) and (b) charge Respondent with "alteration," whereas in the remaining Subparagraphs, the charge is that Respondent "installed" the particular parts.

It is not disputed that in 1994, Respondent performed maintenance and alterations to N154TL and that such work constituted major alterations. Subsequently, in 1996, when the aircraft was to undergo maintenance, as testified to by Mr. Matero, the discrepancies charged in the Complaint were discovered. The record clearly establishes that in the performance of his work, Respondent did maintenance on the specific items/areas as charged in the Complaint. Both Respondent and his expert witness, Mr. Thayer, conceded that the discrepancies were found in the 1996 inspection, e.g., crack, misdrilled holes. Respondent admitted he installed the parts, but denied misdrilling holes, or use of a bushing, or presence of a crack when he installed the parts. The essence of Respondent's defense is that he performed his work acceptably and that the discrepancies found are the result of over-stress or work performed subsequently by some other unidentified person.

I have considered Respondent's argument juxtaposed to the aircraft's maintenance records. Those records do not support Respondent. While the records do show several instances of subsequent work, e.g., tightening of bolts, there is no supporting entries to establish that fittings or attachments were removed, replaced or otherwise altered following Respondent's work. To accept Respondent's position is to believe the parts he replaced were in acceptable condition at the time of his work and that subsequently somebody removed serviceable parts and replaced same with unserviceable parts, i.e., fittings with misdrilled holes, a bushing, a cracked fitting,. I reject such argument, as it is not only illogical, but unsupported on the weight of the reliable and probative evidence, i.e., the aircraft maintenance records and the testimony of Mr. Crawford.

I conclude on the preponderance of the evidence that Respondent, when he did his major alteration/maintenance, installed the unserviceable parts/items as charged in Subparagraphs c, d, e, and f of the Complaint. I further find that the record requires the conclusion, which I reach, that Respondent, in performing his work, performed the work as alleged in Subparagraphs a and b, Paragraph 3, of the Complaint.

Although the record does support Respondent's claim that Mr. Hicks had visited his work site on two occasions, upon consideration of Exhibits C-12, C-14 and C-15 and the testimony of Mr. Balik, I find that the weight of evidence directs the conclusion made herein that Mr. Hicks did not inspect nor issue a field approval of Respondent's work.

Upon consideration of the entire record, I conclude that the preponderance of the reliable and probable evidence mandates the finding that the factual allegations of the Complaint be affirmed. And I so find. I further find that upon the established factual charges that Respondent, in performing his maintenance did so as to be in regulatory violation of Section 43.13(a) and (b), FARs, and I so hold.

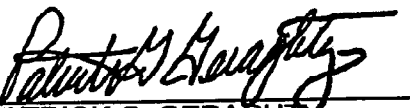
As noted, Complainant seeks, as sanction for the regulatory violations, to revoke Respondent's Mechanic Certificate. In argument, Counsel for Complainant conceded that such severe sanction does not find support in Board precedent, nor was

citation made to Complainant's Sanction Guidance Table. While deference is to be shown to Complainant's choice of sanction, such is not required where the choice does not appear warranted by precedent, nor consistent with Complainant's prior choice of sanction in maintenance cases. Counsel argued for revocation by analogizing the instant facts as akin to falsification of a record. While it is true that discrepancies committed by Respondent would not be readily discovered absent significant dismantling of the aircraft, I do not find that the record supports the conclusion that Respondent performed his work in a manner that would support the conclusion that such equates to a finding of falsification. Nevertheless, the work performed was, in my opinion, significantly deviated from acceptable practices and procedures with potentially catastrophic consequences; thus, the public interest in air safety and to act as a deterrent, a substantial suspension is warranted. I find that such consideration would be adequately addressed by a suspension of Respondent's Mechanic Certificate for a period of 225 days.

IT IS THEREFORE ORDERED THAT:

1. The Complainant's Order, the Complaint, is, except as modified as to sanction, affirmed.
2. The sanction sought is hereby modified from that of revocation to a suspension of 225 days.
3. The Respondent's Mechanic Certificate No. 314622455, with attached ratings, hereby is suspended for a period of 225 days.

ENTERED this 13th day of October 1999 at Denver, Colorado.


PATRICK G. GERAGHTY
ADMINISTRATIVE LAW JUDGE

APPEAL FROM WID

Any party to this proceeding may appeal this written initial decision or order by filing a written notice of appeal within 10 days after the date on which it has been served. An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 5531
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this initial decision or order. An original and 3 copies of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of the other party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by the other party within 30 days after that party was served with the appeal brief. An original and 3 copies of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on the other party.

An original and 3 copies of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other party.

The Board directs your attention to Rules 43, 47 and 48 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. sections 821.43, 821.47 and 821.48) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.

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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

JANE F. GARVEY *
Administrator *
Federal Aviation Administration *
Complainant, *
v. * Docket Number
SE-15623 *
MARTIN M. MATYAS, *
Respondent. *

1 INITIAL ORAL DECISION AND ORDER

2 BY CHIEF JUDGE WILLIAM E. FOWLER, JR.

3 This has been a proceeding before the
4 National Transportation Safety Board held pursuant to
5 the provisions of the Federal Aviation Act of 1957, as
6 that Act was subsequently amended, and the Board's
7 Rules of Practice in Air Safety Proceedings, on the
8 Appeal of Martin M. Matyas from an Order of Suspension
9 issued on April 8th, 1999, which seeks to suspend
10 Respondent Matyas's Private Pilot Certificate Number
11 001782306 for a period of 60 days.

12 Taking into account the Board's Rules of
13 Practice, the Administrator's Order of Suspension
14 serves herein as the complaint and was filed on behalf
15 of the Federal Aviation Administrator, herein the
16 Complainant, through his Regional Counsel, Eastern

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(301) 565-0064

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1 Region, of the Federal Aviation Administration.

2 This matter has been heard before this United
3 States Administrative Law Judge, and as is provided by
4 the Board's Rules of Practice, specifically Section
5 821.42 of those rules, as the judge in this proceeding,
6 I've chosen to invoke the option granted to me under
7 that particular section and issue an Oral Initial
8 Decision forthwith at this time as opposed to a
9 subsequent written decision.

10 Following Notice ^{TO} ~~of~~ the parties, this matter
11 came on for trial on October 14th, 1999, in Rochester,
12 New York. The Respondent, Martin M. Matyas, was
13 present at all times. He was not represented by
14 counsel but elected to proceed on a pro se basis, and,
15 I might add, he did that very ably.

16 The Complainant in this proceeding was
17 represented by Stephen W. Brice, Esquire, of the
18 Regional Counsel's Office, Eastern Region, of the
19 Federal Aviation Administration.

20 The parties have been afforded full
21 opportunity to offer evidence, to call, examine and
22 cross examine witnesses. In addition, the parties have
23 been afforded the opportunity to make argument in
24 furtherance of their respective positions.

25 Once again, gentlemen, I started to say

1 ladies and gentlemen, but the ladies have left us, I'm
2 faced with a case of diametrically-opposing testimony.
3 So, as counsel for the Administrator has so ably
4 stated, we have an issue of credibility involved here.

5 We have a very competent, thoroughly-
6 experienced and, I'm impressed, safety-conscious pilot
7 in Mr. Matyas, who has been flying and acting as a
8 photographer for 28 years. That is an extensive period
9 of time. To say that he is skilled in his profession,
10 I think, would be the under-statement.

11 This case reminds me of an old saying that I
12 used to hear when I was in the United States Navy. "Do
13 anything you want, just don't get caught". I don't say
14 that in degradation of the Respondent. I say that
15 because I -- I think that he's careful, but taking
16 photographs is not the easiest thing in the world to
17 do, particularly when he's alone, even though he's
18 apparently got the skills of doing this down to a
19 science.

20 As I said, he's very experienced. He's flown
21 over this area so many times and taken so many
22 pictures, so it's almost second nature to him.

23 However, we're here today not because of the
24 times that Mr. Matyas has flown over this area. We're
25 here today because of Mrs. Karen Swanger and Mr.

1 Anthony Booher. They're eyewitnesses. They came here
2 and testified under oath as to what they saw. They
3 were surprised on October 7th, 1997, by the low flight
4 of Mr. Matyas's aircraft.

5 Now, he has admitted that he was flying the
6 plane. He's admitted everything that the Administrator
7 has set forth, except his altitude. Now, I cannot and
8 will not reject the testimony under oath of two
9 percipient witnesses, Mrs. Swanger and Mr. Booher.
10 They testified as to what they saw. They were
11 surprised. While they were not put in fear and
12 apprehension, they were very close to it because both
13 of them testified, as you recall, the plane was much
14 too low.

15 Mr. Booher ^{is} ~~was~~ an experienced pilot. He
16 judged the altitude. He saw the flaps down. He saw
17 the registration number. I have no reason to reject
18 his testimony, and I will not.

19 I've had cases like this before, where very
20 experienced pilots believe they're at a thousand feet
21 or above when in reality they're not. So, I feel bound
22 to find and determine that the Administrator was not
23 arbitrary or capricious in the allegations that he has
24 set forth in the charges in his Order of Suspension and
25 the case that he's brought against Mr. Matyas.

1 One thing that troubles me is the sanction in
2 this case. There is a previous violation by Mr. Matyas
3 which was a similar violation in 1995. I cannot be
4 unmindful of that, but neither can Mr. Matyas be
5 unmindful of the fact when he goes out tomorrow, the
6 next day or the next week, that he can continue to fly
7 as he has when he's taking these photographs, because if
8 this happens again, I'm fairly certain there may be an
9 Order of Revocation, Mr. Matyas, issued against you,
10 and this is your livelihood. This is your pursuit.
11 This in essence is your happiness, and in view of that,
12 I'm going to make a minor diminution of the suspension.

13 I can't make a substantial one because you've
14 done what you were charged with doing. So, gentlemen,
15 based on my totality of the ~~the~~ view of the testimony of
16 the five witnesses we've had here today during the
17 course of this proceeding, including the Respondent
18 himself, and the efforts of 11 or 12 documentary
19 exhibits that have been duly admitted into the hearing
20 record, I will proceed to make the following specific
21 Findings of Fact and Conclusions of Law:

22 1. The Respondent, Martin M. Matyas, admits
23 and it is found that he was and is the holder of
24 Private Pilot Certificate Number 001782306.

25 2. The Respondent admits and it is found

1 that on or about October 7th, 1997, Respondent Matyas
2 acted as pilot-in-command of a Cessna 172 Aircraft,
3 Identification Number N 13684, in the vicinity of
4 Rochester, New York.

5 3. The Respondent admits and it is found
6 that specifically during the above-described flight
7 operation, Respondent operated the aircraft in the
8 vicinity of and over the Town of Ogden, New York.

9 4. It is found that, additionally, during
10 the above-described flight operation, Respondent
11 operated the aircraft at an altitude of approximately
12 200 feet above ground level, above a residential
13 neighborhood.

14 5. It is found that the Respondent operated
15 the aircraft over a congested town at an altitude below
16 1,000 feet above the highest obstacle within a
17 horizontal radius of 2,000 feet of the aircraft.

18 6. It is found that the Respondent operated
19 the aircraft below an altitude that would have allowed
20 Respondent to make an emergency landing without undue
21 hazard to persons and property on the surface had a
22 power unit failed.

23 Finally, the Respondent operated the aircraft
24 in such a manner so as to potentially endanger the life
25 and property of another.

1 8. It is found by reason of the foregoing,
2 the Respondent, Martin M. Matyas, violated the
3 following sections of the Federal Aviation Regulations:
4 Section 91.119(a), Section 91.119(b), and Section
5 91.13(a), and I'll read that last section, which
6 states, "No person may operate an aircraft in a
7 careless manner so as to potentially endanger the life
8 or property of another."

9 9. This Judge finds that safety in air
10 commerce or in air transportation and the public
11 interest does apparently require the affirmation of the
12 Administrator's Order of Suspension, dated April 8th,
13 1999, ~~and~~ in view of the violation of the three afore-
14 cited sections of the Federal Aviation Regulations.

15 However, taking into account the totality of
16 all of the particular, peculiar and salient facts and
17 circumstances pertaining to and surrounding this
18 proceeding, it is my judgment that the Administrator's
19 sought sanction of 60 days' suspension of Respondent's
20 private pilot certificate be modified to a period of 45
21 days of the Respondent's private pilot certificate.

22 Order

23 IT IS ORDERED that the Administrator's Order
24 of Suspension, dated April 8th, 1999, be and the same
25 hereby is modified to a period of suspension of 45 days

1 of Respondent Matyas's Private Pilot Certificate Number
2 001782306.

3 This Order was issued by William E. Fowler,
4 Jr., United States Administrative Law Judge.

5 Appeal

6 Either party may appeal the Judge's Oral
7 Initial Decision. The appellant must file his Notice
8 of Appeal within 10 days from today's date of October
9 14th, 1999, and must within 50 days from today's date,
10 in order to perfect his appeal, file a brief setting
11 forth his objections to the Judge's Oral Initial
12 Decision.

13 *THE* Notice of Appeal and the brief shall be filed
14 with the Office of Judges, National Transportation
15 Safety Board, 450 L'Enfant Plaza East, SW, Washington,
16 D.C. 20594.

17 If no appeal to the Board from either party
18 is received or if the Board does not file a motion of
19 its own volition to review the Judge's Oral Initial
20 Decision within the time allowed, the Judge's decision
21 shall become final.

22 Timely filing of such an appeal, however,
23 shall stay the Order as set forth in the Judge's
24 decision.

25 Off the record.

1 (Discussion off the record.)

2 JUDGE FOWLER: On the record.

3 Let the record indicate that Respondent is
4 undecided as of this moment as to whether or not he
5 will file a Notice of Appeal from the Judge's decision.
6 I'll give you the time parameters again, Mr. Matyas.

7 10 days from today's date for the Notice of
8 Appeal, and 50 days from today's date to file a brief
9 perfecting your appeal and setting forth your
10 objections to the decision.

11 Gentlemen, if there's nothing further, I
12 would declare this hearing closed, but before we go off
13 the record, I would like to express my thanks to the
14 parties, and I'd like to also express my thanks to all
15 of the witnesses and to all those in attendance for
16 their help, assistance and cooperation during the
17 course of this proceeding here today.

18 We stand adjourned.

19 (Whereupon, at 4:30 p.m., the hearing was
20 adjourned.)

21

22

23

24

25

Edited
11-18-99
WCH Jr

1
2 REPORTER'S CERTIFICATE

3 This is to certify that the attached
4 proceedings before: NTSB
5

6
7 In the Matter of:
8 FAA V. MARTIN M. MATYAS
9

10
11
12 were held as herein appears and that this is the
13 original transcript thereof for the file of the
14 Department, Commission, Administrative Law Judge
15 or the Agency.

16 EXECUTIVE COURT REPORTERS, INC.

17 1320 Fenwick Lane Suite 702
SILVER SPRING, MARYLAND 20910
(301) 565-0064

18 Official Reporter

19
20 Dated: OCTOBER 14, 1999
21
22
23
24
25

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

JANE F. GARVEY)	
Administrator)	
Federal Aviation Administration,)	
Complainant,)	
)	Docket No.: SE-15654
v.)	
)	
MICHAEL J. KEATING,)	
)	
Respondent.)	

October 14, 1999

DECISION AND ORDER

HONORABLE PATRICK G. GERAGHTY
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

DAVID M. HERNANDEZ, ESQ.
Office of the Chief Counsel
Federal Aviation Administration
Enforcement Division
800 Independence Avenue SW
Washington, D.C. 20591

On behalf of the Respondent:

RICHARD WERNER, ESQ.
Suite 1070
303 E. 17th Avenue
Denver, Colorado

ARGIE REPORTING SERVICE
1000 West 70th Terrace
Kansas City, Missouri 64113

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DECISION AND ORDER

1
2 JUDGE GERAGHTY: This has been a
3 proceeding before the National Transportation
4 Safety Board on the Appeal of Michael J.
5 C.F.R., hereinafter referred to as Respondent,
6 from an Amended Order of Revocation issued
7 against him by the Administrator of the Federal
8 Aviation Administration, herein the
9 Complainant, through one of her Staff Counsel
10 of the Office of Chief Counsel, Washington,
11 D.C. The Amended Order of Revocation serves
12 herein as the Complaint.

13 The matter has been heard before this
14 Administrative Law Judge, and as provided by
15 the Board's Rules of Practice, I am issuing a
16 Bench Decision in the proceeding.

17 Following notice to the Parties the
18 matter was called for trial to commence on
19 October 13, 1999, in Denver, Colorado.
20 Complainant was represented by one of her Staff
21 Counsel, David Hernandez, Esq., of the Office
22 of Chief Counsel. The Respondent was present
23 at all times and was represented by his
24 Counsel, Richard Werner, Esq., of Denver,
25 Colorado.

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1 The parties have been afforded full
2 opportunity to offer evidence, to call, examine
3 and cross-examine witnesses, and to make
4 argument in support of their respective
5 positions.

6 In discussing the evidence I will
7 summarize the evidence to that which I have
8 concluded supports the conclusion that I have
9 reached herein. I have, however, considered
10 all of the evidence, both oral and documentary,
11 and that includes both the videos, the
12 transcripts thereof, and statements that were
13 offered and received into evidence. That
14 evidence which I do not specifically mention is
15 viewed by me as essentially being corroborative
16 of that which I do mention or is not materially
17 affecting the outcome of my decision.

18 AGREEMENT

19 By pleading and stipulation in
20 session it was agreed there was no dispute as
21 to the following numbered paragraphs of the
22 Complaint: Paragraphs 1 through 6, and
23 Paragraphs 9 through 15 (phonetic). Therefore,
24 on those admissions the matters contained
25 therein are taken as having been established

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1 for purposes of the decision. As noted in the
2 record, I have taken judicial notice of the
3 allegation contained in Paragraph 16 of the
4 Complaint, and, therefore, that matter is also
5 held as established for purposes of this
6 decision.

7 DISCUSSION

8 The Order of Revocation seeks to
9 revoke the Respondent's Airline Transport Pilot
10 Certificate based upon allegations that his
11 conduct in the course of submission to a random
12 drug screening, to which requirements he was
13 subject by reason of his employment by Spirit
14 Airlines, he did so act as to obstruct the
15 validity of the collection process and that
16 such amounts to a refusal to submit to drug
17 testing. And, therefore, it follows that under
18 provisions of Section 61.14 of the Federal
19 Aviation Regulations the Complainant may
20 exercise the decision to seek revocation of any
21 certificate rating or authorization issued to
22 the Respondent under that Part. That, of
23 course, being his Airline Transport Pilot
24 Certificate.

25 The Complainant's case was made

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1 through testimony of several live witnesses and
2 video testimony offered during their case in
3 chief. The first of those witnesses was a Mr.
4 John Anthony, who was the Maintenance Manager
5 at Spirit Airlines, holding that position for
6 about four years. He stated that he had drug
7 tests administered to him by the Concentra
8 Clinic which was the same medical facility at
9 which the Respondent was required to submit to
10 the random drug screening.

11 Mr. Anthony stated that in his
12 screening on September 11th -- strike that. On
13 November 1998, he was tested by Ms. Bailey and
14 that in his testimony he went through what the
15 procedures were that Ms. Bailey followed at the
16 time. He testified that the collection kit or
17 box was sealed. That the three bottles inside
18 were also wrapped. That those items were all
19 opened in his presence. That he was given the
20 collection container and after he filled it he
21 came out, she took it from him, checked the
22 temperature, put it into split specimen
23 bottles, resealed it in the bag and then
24 resealed that in the box. Essentially saying
25 that she -- Ms. Bailey -- followed all the

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1 requisite procedures as specified in the
2 regulations for drug testing or alcohol
3 testing.

4 He indicated that he was not wearing
5 a jacket. There was no pat down. Not told to
6 empty his pockets. However, that he did
7 observe the entire test and that he felt that
8 this was one of a more professional drug
9 screenings that he had experienced.

10 Ms. Debbie Pate was employed at the
11 Concentra Medical Center, been there about one
12 year prior to this incident, she supervised Ms.
13 Bailey who was the medical assistant who
14 actually did the collection process with the
15 Respondent on the date in question which is
16 October 21st, 1998.

17 Ms. Pate testified that Ms. Bailey,
18 in fact, had been terminated from her
19 employment at Concentra. That termination
20 being the result of repeated absences.
21 Apparently there was a policy that three
22 absences or more could result in termination.
23 And also a mishap with the key to a narcotics
24 ~~h~~locker or box where apparently Ms. Bailey
25 neglected to get the key from the individual

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1 who had had it on the prior shift. In any
2 event, Ms. Bailey was terminated.

3 Ms. Pate did testify, however, that
4 while the termination was not due to any lack
5 of performance by Ms. Bailey as a collector and
6 that in Ms. Pate's opinion Ms. Bailey was an
7 excellent collector. However, on cross-
8 examination -- and this is the only evidence in
9 front of me -- Ms. Pate stated that she
10 monitored only a mock collection by Ms. Bailey
11 and not any actual collection. So, in my view,
12 her opinion is to be taken as predicated upon a
13 single observation of a mock collection.

14 Ms. Pate did indicate that to her
15 knowledge that Ms. Bailey had never failed to
16 follow the procedure, such as, washing hands,
17 removing outer garments or using unsealed kits.
18 However, this again was, as Ms. Pate said, to
19 her knowledge, which I also take as being
20 looked at in conjunction with her statement
21 that she had observed a single mock collection.
22 And with respect to the regulations, Ms. Pate
23 did say that the collector must follow the
24 rules and regulations of the facility. And, of
25 course, those rules and regulations were

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1 received as an exhibit and I have reviewed
2 those.

3 Ms. Julie Pritt, whose testimony was
4 taken by means of video deposition, she
5 apparently had a random drug screening
6 conducted on October 16, 1998, and by Ms.
7 Bailey. Her testimony, quite frankly, was
8 somewhat confused. I observed her demeanor
9 closely as she was giving it on the video.
10 When asked as to whether Ms. Bailey had
11 directed her, Ms. Pritt, to wash her hands she
12 stated on direct, "I was told not to wash my
13 hands." Subsequently in her testimony, after
14 saying that the test was done professionally,
15 she changed her testimony and said, "I did wash
16 my hands." So we have an internal conflict in
17 the testimony of Ms. Pritt. As I said, it
18 appeared to me that she was not really sure
19 whether she had been or had not been told to
20 wash her hands. However, Ms. Pritt was clear
21 that with respect to the kit itself that
22 everything had been sealed in a kit and was not
23 opened until the testing began with her.

24 Ms. Dianna Pietrzak is with Spirit
25 Airlines. She is the Anti-Drug and Alcohol

1 Program Manager and apparently was in that
2 position in October of 1998. She testified as
3 to what a refusal to submit was an adulteration
4 in her view would amount, under the
5 regulations, to a refusal to submit to the drug
6 test. She expressed her opinion based upon her
7 investigation and involvement and as a result
8 of her position with Spirit Airlines that the
9 Respondent had adulterated his specimen since,
10 in her view, was the only way it could have
11 gotten there.

12 She did say that she had also
13 observed a mock collection as done by Ms.
14 Bailey. And in Ms. Pietrzak's opinion that Ms.
15 Bailey had done very well on that mock
16 collection.

17 Although out of sequence, it does
18 appear that -- and I'll discuss this -- none of
19 these two witnesses really addressed the
20 question of whether or not they observed actual
21 collections. There was testimony that at least
22 the supervisor was outside the area generally
23 but there is no direct testimony that either of
24 these two witnesses had ever observed Ms.
25 Bailey on an occasion or more than one occasion

1 conducting actual random drug screenings. At
2 least I do not find that in the evidence in
3 front of me.

4 There was a stipulation entered into
5 by the ~~P~~arties. One is a written stipulation
6 which is, of course, part of the record. And
7 that was that the random drug sample that was
8 tested -- and, of course, that was also
9 reported C-2 and C-3. It does show there was a
10 detect~~ed~~ level of nitrites at 8,387. Now, in
11 the sample with a cut-off of 1,000. Further,
12 the oral stipulation during the proceeding, the
13 ~~P~~arties stipulated that that level, 8,387, was
14 -- could not have been obtained by anything
15 resulting physiologically or as a result of a
16 substance such as Cipro (phonetic) or Vitamin
17 C. There's a whole listing that the ~~P~~arties
18 went through.

19 Mr. Robert Neal is with the Aviation
20 Drug Abatement Division. He's an Inspector
21 with them and he's been there for three years.
22 He investigated this particular instance and in
23 his testimony detailed what he had done in the
24 process of his investigation. On the reports
25 and the chain of custody form it does show that

1 the collection time for the test conducted on
2 the Respondent by Ms. Bailey took place at
3 11:00 p.m.

4 Mr. Neal acknowledged that he had
5 never discussed in his investigation, however,
6 the matters with the Respondent. He opined,
7 however, that the Respondent, based upon the
8 investigation that he, Mr. Neal, conducted,
9 that the Respondent had, in fact, adulterated
10 his urine specimen collected on the date of
11 October 21, 1998. Similarly, he stated that he
12 observed a mock collection by Ms. Bailey and
13 felt that she had done an outstanding job on
14 the mock collection.

15 On cross-examination of the witness
16 it was conceded -- and I would take this would
17 be the same with the other testimony -- that
18 Ms. Bailey knew that she was being observed by
19 Mr. Neal at the time of the mock collection.
20 And I would infer it be reasonable that if a
21 mock collection was taking place and she -- and
22 Ms. Bailey was being observed by her
23 supervisors, either Ms. Pietrzak or Ms. Pate,
24 that, in fact, Ms. Bailey would realize that it
25 was a mock collection, obviously.

1 Ms. Amy Bailey, the collector,
2 medical assistant who performed the collection,
3 testified by means of a video. The video and
4 the transcript were both received into
5 evidence. And I very closely -- and I observe
6 this for the record -- watched the video and
7 read the transcript at the same time as the
8 video was taking place, looking at both of
9 them, because I realized that if a question
10 would arise as to the credibility of the
11 testimony in this case and a balancing would
12 have to take place. In any event, turning to
13 Ms. Bailey's testimony, she testified that she
14 had done somewhere between 200 to 300
15 collections while employed at Concentra Medical
16 Center. She stated that she had never had
17 anyone question her competency as a collector.
18 She conceded, however, that she had received
19 about five affidavits of correction but that,
20 stating further, that none of them had resulted
21 in any cancellation of a test or any type of
22 disciplinary action.

23 In her testimony using demonstrative
24 evidence, she went through what she felt was
25 the procedure that she used on the date in

1 question when she collected the specimen from
2 the Respondent indicating that she had opened a
3 sealed box, opened the package inside that
4 which is also sealed in which the specimen
5 bottles and the collection cup are sealed
6 within the outer kit. And then giving the
7 collection cup to the Respondent. And
8 afterwards pouring the specimen into the two
9 specimen bottles, resealing it in the kit, and
10 obtaining the signatures on the chain of
11 custody which I've already had reference to.

12 On cross-examination Ms. Bailey,
13 however, acknowledged that she had no specific
14 recollection of the collection process, nor
15 recollection of the manner in which the
16 collection took place. She acknowledged that
17 she was going off duty at midnight on the date
18 in question. When pressed on cross-
19 examination, she again acknowledged or conceded
20 that she did not remember the Respondent or how
21 she collected the Respondent's specimen on
22 October 21st, 1998. That was also her
23 response, apparently, in her responses to
24 discovery interrogatories. That is, that she
25 had no specific recollection of collecting

1 Respondent's specimen. So with those
2 statements from her, I feel it is established
3 that, in fact, Ms. Bailey has no current
4 recollection of how she performed the
5 collection process on that date or what steps
6 she took in the collection of that specimen.

7 Ms. Bailey did state, however, to
8 ameliorate the aforesaid, that she does every
9 collection in the same manner. And she denied
10 not doing the collection, on the date in
11 question, correctly.

12 There was a discussion as to her
13 termination and she was quite candid in
14 admitting that she had, in fact, been
15 terminated indicating that it was because of
16 absences which she related to one of her
17 children being sick, stating that she preferred
18 to stay home rather than go to work, which
19 would be understandable. And the second item
20 being, of course, the problem with the
21 narcotics key.

22 In further testimony on her video
23 deposition, she did maintain that she was
24 positive that she had made no mistakes with the
25 Respondent's test. However, again conceded

1 that she had no specific recollection of that
2 test. Going on, after having conceded that or
3 acknowledging that, to say that she denied that
4 she had not told the Respondent to wash his
5 hands or to remove any outer clothing.

6 Mr. Ken Edgell is with the Drug and
7 Alcohol Policy -- he's an advisor to the
8 Secretary of Transportation. He has a lot of
9 experience with these regulations and indicated
10 he, in fact, had written parts of them. He
11 opined that, assuming arguendo, that an
12 individual who was not told to wash his hands
13 prior to the collection process, that that
14 would not be a fatal flaw. Similarly, that a
15 failure to be told to remove outer clothing
16 would not be fatal to the collection process.

17 Respondent presented his case through
18 his testimony, the testimony of several
19 witnesses and affidavits. First of the
20 witnesses was the Respondent's wife, Michelle
21 Keating. She testified essentially to her
22 activities with the Respondent beginning about
23 30 days prior to the date of the collection.
24 She states that she was with the Respondent
25 during that prior period of time breaking it

1 down into several segments. October 9 to
2 October 15, they worked together at home. Then
3 from the 15th to the 21st she was not with him
4 saying that her husband had gone hunting with
5 one Ray Ellis. Mr. Ellis' testimony will be
6 discussed subsequently.

7 She stated that up until the date
8 where she had left or the husband had left on
9 the hunting trip, that is, October 15, that
10 she, Michelle, had never seen the Respondent
11 use any type of drugs. And, in fact, over the
12 three and a half years that she has known him
13 -- including the time prior to when they were
14 married -- that she had never seen him to use
15 any type of drugs, at least prohibited drugs.

16 Mr. James Keating, the Respondent's
17 father, testified on behalf of his son, the
18 Respondent. His testimony may just briefly be
19 stated as essentially being character
20 testimony, that of a loving father for his son,
21 one who is proud of his son's accomplishments.
22 However, the testimony was that his son was not
23 of the type of character that would lie or one
24 that would abuse alcohol or drugs.

25 Mr. Craig Boyce is a long-time friend

1 of the Respondent. He's a pilot, has known the
2 Respondent since 1987, stating that they had
3 both apparently commenced flight training
4 together at Jefferson County Airport here in
5 Colorado. And, in fact, both of them had
6 become Certificated Flight Instructors
7 together. Mr. Boyce stated that the
8 relationship was not just professional, but
9 also personal, having flown with him at
10 apparently Flagship Airlines and also having
11 crewed together with the Respondent. Mr.
12 Boyce's opinion as to truth and veracity was
13 that that of the Respondent was an outstanding
14 reputation and indicating that even the word
15 outstanding was not quite adequate to describe
16 Mr. Boyce's view of the Respondent, stating
17 that over the entire period of time that he had
18 known the Respondent he had never known the
19 Respondent to use any type of illicit drugs.

20 Mr. Raymond Ellis testified on behalf
21 of the Respondent. He is a pilot, as is Mr.
22 Boyce. Mr. Ellis has known the Respondent
23 since 1992, again the acquaintance taking place
24 at Flagship Airlines. He testified he was with
25 the Respondent from October 15th through the

1 21st, Mr. Ellis having come to Colorado to go
2 Elk hunting with the Respondent. They, from
3 the testimony, were together during that entire
4 period of time, in close proximity out in the
5 boondocks looking, apparently unsuccessfully,
6 for elk. On the last day, that would be on the
7 20th, apparently, they gave up their hunting
8 trip and returned to Respondent's residence, I
9 believe, Basalt, Colorado, where they cleaned
10 up, slept over night and then drove from there
11 down to Denver on the morning of the 21st so
12 that the Respondent could take a flight to
13 return to his flight status with Spirit
14 Airlines. Mr. Ellis stated that during the
15 entire time that he was with the Respondent
16 that he never observed any drug abuse or use by
17 the Respondent. And, in fact, over the entire
18 period of time that he has known the Respondent
19 he has never seen any type of abuse to that
20 effect.

21 Respondent testified on his own
22 behalf and he testified as to his beginning
23 flight training and indicated that in the
24 course of his experience with professional
25 aviation he has had 12 random or pre-employment

1 drug tests and that he has passed all those
2 tests. He also testified that he has never had
3 any adverse experience with any type of law
4 enforcement proceedings -- DUIs or any other
5 indication where he has had problems with abuse
6 of either alcohol or drugs, maintaining that he
7 had passed, as I've indicated, all of the tests
8 that he had, in fact, been given.

9 He agreed with the testimony as given
10 by Mr. Ellis so I will not repeat that. He
11 stated that after having arrived at DIA he had
12 breakfast at Denver International Airport,
13 caught a Northwest flight, dead heading out at
14 about 4:50 a.m. to Detroit. In Detroit he
15 apparently had some down time sitting around
16 the company facilities until his flight
17 departed. He flew a line trip that day
18 departing Detroit to Tampa with a quick
19 turnaround and back to Detroit, indicating ^{that} in
20 Tampa that he had only time to grab some Tacos
21 or something, pre-flight the airplane and
22 return to Denver.

23 He specifically denied that he did
24 anything to adulterate the drug test and
25 specifically put nothing in the specimen that

1 he did, in fact, give to the lab at about 2300
2 hours as they state, and the time, of course,
3 is supported by the chain of custody so that
4 the lab test did take place at a late hour.

5 Respondent testified in detail as to
6 what happened at the collection site. He said
7 that after arriving back in Denver he was
8 informed that he had to take this test, ended
9 up having to make a phone call of how he's
10 going to get from one end of the airport over
11 to the other at Detroit at that hour. Finally
12 got a ride over, some cleaning lady drove him
13 over. When they arrived at the Concentra he
14 said two women were at a reception desk, one of
15 which was Ms. Bailey. He filled in the sign-in
16 sheet. He stated at the time he still had his
17 uniform on indicating that he had the uniform
18 jacket on which is like a dress suit coat with
19 his wings, and also his hat. Made some small
20 talk and then ended up sitting in a waiting
21 room for about 10 or 15 minutes, at the
22 conclusion of which Ms. Bailey then called him
23 in and he followed her back down a hallway to
24 do the breathalyzer test. He states that they
25 did go past the collection site and that the

1 collection kits may have been -- material may
2 have been out on a shelf as he went by. But he
3 essentially paid no attention to them since he
4 just was in there, wanted to get the test done
5 and was not really watching anything as he went
6 down the hallway.

7 At the conclusion of the breathalyzer
8 test he and Ms. Bailey walked back down to the
9 collection site. Respondent testified that
10 when he got to the collection site there was a
11 counter along the wall opposite where the rest
12 room was. He stated there was an open kit or
13 open box and the specimen bottles and the
14 collection cup itself were out of the box and
15 unwrapped and standing out on the shelf.
16 Respondent did demonstrate that setting out the
17 items and showing that, in fact, the collection
18 kit box was not seal wrapped and that the
19 interior baggie in which the bottles are
20 contained inside the box was also not present
21 and that the bottles were separated out. And
22 the collection cup, as he indicated, has
23 already been unwrapped when he got to the
24 collection site. He stated he was never asked
25 whether this kit was acceptable. He simply

1 assumed that it was the collection kit and
2 indicating Ms. Bailey not only didn't say that
3 but never gave him any directions. He was
4 never told to remove his coat or asked to
5 remove his coat. And he was not told to wash
6 his hands.

7 On cross-examination he conceded that
8 by the time that this was taking place he had
9 been awake for about 17 1/2 hours, that it was
10 a long day. He stated, however, he was used to
11 that, that pilots generally do end up spending
12 a lot of hours ~~and~~ not as many flight hours. He
13 states that, in fact, he was anxious to get
14 through with this because he had been up a lot
15 of -- a lot of hours and he wanted to get to
16 what he terms as his "crash pad" so he could get
17 to sleep. In his view, Ms. Bailey, while
18 acting professionally, did seem like she was in
19 a hurry to get out of there. And as I've
20 indicated on the prior discussion, she was also
21 scheduled to go off duty, having been on,
22 apparently, the afternoon shift with
23 termination of that shift to occur at about
24 midnight.

25 After having gone through the

1 collection process, it was not until October
2 26th that he was aware that a problem had
3 occurred. That apparently is on a phone call
4 when he returned home. Had a call to return to
5 his chief pilot. Was told there was a problem.
6 He was terminated by Spirit Airlines because of
7 this. His request to have the split sample
8 tested was refused. And that, of course, was
9 because the provision in the regulation does
10 not provide for the testing of a split sample
11 in the type of circumstances that occurred here
12 and that's by regulatory requirement or
13 provision.

14 As I've indicated, there's no dispute
15 that the nitrite at the level I've already
16 mentioned was found to be present. Respondent
17 stated he doesn't know who put it in there, or
18 how it could have gotten into the cup.
19 However, he was persistent in his view and
20 testimony that the collection kit itself, at
21 the time he returned to the collection site
22 location with Ms. Bailey, the kit had
23 previously been opened, the wrappings were off
24 and the cup, unwrapped, was out on the counter.
25 Of course, there's no testimony as to how long

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1 those items were in that condition.

2 That, gentlemen, is my view of the
3 pertinent evidence in the case. Before
4 discussing it in some more detail I would
5 simply observe some of the requirements as they
6 are pertinent here. Respondent is charged with
7 a refusal to submit to a random drug test. The
8 definition of a random drug test, as contained
9 in Appendix I of Section 121, Federal Aviation
10 Regulations, does provide, as is pertinent
11 here, that a refusal occurs or is meant to
12 include where the individual engages in a
13 conduct which clearly obstructs the testing
14 process. The present of an adulterant in a
15 urine specimen that is collected for a purpose
16 of random drug testing clearly obstructs the
17 testing process. So as a matter of regulatory
18 provision, the presence of the nitrite would
19 constitute a refusal to test. That does not
20 mean a decision as to how the adulterant got in
21 there, whether it's ^{soap} ~~(inaudible)~~, or nitrite or
22 something else. Just that I do conclude that
23 the present of an adulterant is equivalent to
24 an obstruction, and, therefore, that is a
25 refusal. Similarly, the Regulation does

1 provide in 49 C.F.R., Section 40, requirements
2 for the performance of a test and the
3 performances are set in terms of "shall", so these
4 are mandatory. The collection site person
5 shall ask the individual to remove any
6 unnecessary outer garments. The testimony here
7 is in conflict. Mr. Edgell stated that this
8 would not be in itself fatal. And in my view
9 removal of the outer garment is more for the
10 protection of the collector than it is for the
11 collectee in that it is meant to remove any or
12 reduce the opportunity for someone to have
13 someplace to conceal an adulterant if one was
14 so disposed. However, the process then goes on
15 to say, the individual shall be instructed,
16 again mandatory, to wash his or her hands prior
17 to the collection process. Again, that is
18 simply what the regulations provide.

19 As I've indicated on the stipulations
20 and the clear evidence in front of me, a
21 prohibitive amount of nitrite was found in the
22 specimen collected from the Respondent on the
23 night in question. So it is present. But it
24 is not incumbent upon me or the Board to
25 explain or come up with a reason or how the

1 nitrite was present in the specimen. Rather,
2 the burden of proof in this case on all the
3 issues rests with the Complainant. The
4 Complainant must prove by a preponderance of
5 the reliable and credible and probative
6 evidence that the nitrites were present in the
7 specimen as a result of action by the
8 Respondent and reasonably exclude any other
9 conclusion. So I look at the evidence in that
10 way, meaning that there must be at least enough
11 evidence to preclude the reasonable basis on
12 the evidence that there was any prior
13 contamination. Whether or not the nitrite was
14 visible in the cup, or could have been in the
15 form which it would not have been ^{seen,} again,
16 there's nothing in the evidence in front of me.
17 It's simply that it was there. But it is by
18 the preponderance of the evidence to show that
19 the Respondent is the one responsible for its
20 presence.

21 The testimony of Ms. Pritt was --
22 maybe she was told to wash her hands, maybe she
23 wasn't. She went back and forth. I don't feel
24 that her testimony really establishes one way
25 or the other. The mock collection processes,

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1 in my view, do not really establish whether Ms.
2 Bailey in each and every occasion follows that.
3 That was her testimony. She appeared credible.
4 She was -- she appeared to be trying to answer
5 forthright or forthrightly when questioned by
6 both Counsel during her deposition. However,
7 she did concede that she had no specific
8 recollection of what she did on the date in
9 question or how she collected the specimen and
10 what she did or did not tell the Respondent. I
11 think that's a fair interpretation of her
12 testimony. So her maintaining that she did it
13 correctly is simply, "That's the way I always
14 do it, and, therefore, that's the way I did it
15 that night."

16 I, therefore, have an issue between
17 the Respondent and his testimony as to what
18 actually occurred at the collection site and
19 that's the governing issue. What actually
20 happened? How was it done? And I have one
21 version as given by Ms. Bailey and I have the
22 testimony of the Complainant's witnesses as to
23 the mock collection process. Her testimony
24 that there were no complaints, that nothing had
25 ever been rejected because of anything she had

1 done. That she always did it by the numbers,
2 although she conceded that she did not know all
3 the provisions in the manual. And I also have
4 to take into account that she was, in fact,
5 terminated. While the termination had nothing
6 to do specifically with the collection process,
7 she, in fact, was terminated for repeated
8 absences and a serious situation which involves
9 the narcotic key. Without the narcotic key
10 being passed, access to a narcotics locker
11 can't be made and, of course, there's a
12 question as to the control of narcotics. So
13 there is, as argued, and I would agree, some
14 indication that on all occasions she may not
15 follow the specific requirements or
16 regulations, if you will, using the term
17 broadly, as pertaining to her job at Concentra.
18 And, in fact, she was terminated for failing to
19 do so. So I have to take that into account.

20 On the other hand, I have the
21 Respondent's testimony as to what occurred at
22 the collection site. He is adamant in his
23 recollection. While he didn't state that in
24 his statement that he apparently prepared for
25 his counsel and referred to by Complainant, it

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1 does not appear to me to be unreasonable to say
2 that having prepared it just a few days later
3 at that time he was attempting to come up with
4 some explanation of what happened. And with
5 something as serious as being fired from his
6 airline job, his professional career, what
7 happened at the collection site would be vivid
8 in his recollection. I mean, this is a serious
9 thing. Someone sees a horrific accident, it
10 sticks with you for a while. Same thing here.
11 Respondent testified that he had no prior
12 history of any drug abuse or alcohol abuse.
13 That is not contradicted by any evidence
14 offered by the Complainant. Respondent also
15 testified that he had taken 12 prior random
16 drug or pre-employment drug tests and had
17 passed all of those. Again, there's no
18 contradictory evidence. In support of that
19 testimony, if that's all the ~~re~~ was, I would
20 have trouble balancing it. But his testimony
21 is generally supported by his wife and his
22 parents. Those witnesses are, of course, taken
23 as having at least a predisposition to support
24 a husband and the son so I take that testimony ^{that way,}
25 However, I also take that in conjunction with

1 the testimony offered live by the other
2 witnesses called by the Respondent to testify
3 as to his character and his prior drug use.
4 The drug use, at least is pertinent as to
5 whether there would be something in his
6 background which would cause him to have some
7 reason to adulterate a sample, similarly, as
8 having passed 12 prior screenings. I have also
9 read closely the statements that were put in
10 which were Respondent's ^{Exhibits} 5(a) through (g),
11 particularly as to his reputation, but as to
12 the writers' familiarity with the Respondent
13 and their knowledge as to his conduct with
14 respect to abuse of any prohibited substances.
15 In each instance they indicate that that had
16 never occurred during the periods of time,
17 which are over several years, that the various
18 individuals have known the Respondent. So I
19 have to balance the fact that Respondent's
20 testimony is supported by these statements, the
21 live testimony and the testimony of ~~whos~~
22 relations and friends.

23 So it comes down then to the question
24 of credibility as to exactly how this test was
25 conducted because, on his view, he was not told

1 to wash his hands, he was not told to remove
2 his clothing. While individually neither of
3 these might be fatal, they have to be taken in
4 the context of the entire collection process as
5 he testified to it. More significantly,
6 however, is whether or not the kit was handled
7 as required by the Regulations. Ms. Bailey
8 maintained that she did it correctly and the
9 other witnesses said that's the way she did it
10 on the mock collections. But those are mock
11 collections. This collection took place at
12 11:00 at night. Ms. Bailey was going off duty
13 one hour later. Respondent testified that the
14 box was already opened. The container was
15 already out on the shelf when they arrived
16 there. There's no testimony -- and, of course,
17 he wouldn't know how long it had been there.
18 It could have been there for any period of
19 time. Of course, Ms. Bailey says it wasn't
20 there. That's a credibility issue. Also take
21 into account Ms. Bailey's acknowledgement that
22 she had no specific recollection of how she
23 administered this random drug test to the
24 Respondent on the night in question. She
25 didn't remember the Respondent. She didn't

1 remember the procedure she used. All she could
2 say was that, "This is the way I always do it
3 so I must have done it that way, and,
4 therefore, I must have told him to wash his
5 hands, I must have told him to take his coat
6 off, I must have opened a sealed box and the
7 sealed containers." There is the conflict. So
8 it's a credibility determination. As I noted
9 early on the burden of proof on the Complainant
10 is to establish by a preponderance of the
11 reliable and credible evidence that the
12 explanation for the presence in the nitrites is
13 that of the Respondent. In my view, the
14 evidence as offered by both sides leaves in
15 dispute as to exactly how this collection
16 process occurred on the night of October 21st,
17 1998. ^{Complainant}~~Respondent~~ has not established by a
18 preponderance of the reliable and probative
19 evidence that the collection process took place
20 exactly as required by the Regulations.
21 Specifically, that there was a sealed container
22 with sealed bottles inside of it. There is
23 sufficient probative evidence and reliable
24 evidence offered also by the Respondent,
25 although it's self-serving, it is still

1 entitled to weight, particularly where it's
2 supported by the prior historical testimony as
3 offered by the Respondent and not contradicted
4 as to prior testing and the testimony of the
5 witnesses as to his background with respect to
6 no prior drug use. And also, what he did on
7 the date in question. It was a long day.
8 However, he apparently got up in the morning,
9 drove to Denver, left his car because he says
10 he picked his car up when he came back. So he
11 drove. Then dead headed to Detroit, hung
12 around for a couple of hours and then flew the
13 line to Tampa and then back to Detroit and then
14 had his drug screening test. He apparently
15 performed that day adequately, at least there's
16 no indication of otherwise. So in my view, the
17 evidence as to the collection process is a
18 standoff. And in my view the Complainant has
19 not established by a preponderance of the
20 credible evidence that the test could not have
21 been contaminated by the way in which Ms.
22 Bailey conducted it. I'm not saying that she
23 did. It's just that that is not on the
24 preponderance of the evidence resolvable one
25 way or the other. It's essentially a standoff.

1 And as I've indicated, it is not incumbent upon
2 the Board to determine or reach a conclusion as
3 to how the sample could have been contaminated.
4 Obviously, if the box was open, the seals were
5 all broken and the cup was standing there for
6 some period of time, a cleaning person was
7 present. They may not have been back there
8 during the collection process. But if that cup
9 was out there for any period of time, anything
10 could have been possible with it. And, of
11 course, under the Regulation the testing of a
12 split sample was not accomplished. And if it
13 was contaminated in the main cup, then, of
14 course, the split would have been contaminated.
15 But it's also possible that the specimen bottle
16 could have been contaminated since it, on the
17 testimony, could have been out also.

18 In my view, therefore, although it is
19 established on the evidence that the specimen
20 is contaminated by a prohibited amount of an
21 adulterant, and, therefore, that there is no
22 doubt that that occurred, the fact is is that
23 the evidence by a preponderance of the reliable
24 and probative evidence does not establish that
25 the Respondent is, in fact, the sole source of

1 that contamination because there is a question
2 on the evidence in front of me as to whether
3 the test was performed correctly. That being
4 the case, I find that the Respondent is not in
5 regulatory violation of Section 6114(b) of the
6 Regulations, and that, although the sample was
7 contaminated, since it is not established on a
8 preponderance of the evidence that he
9 adulterated the sample, that he did not refuse
10 to undergo a random drug test.

11 I find, therefore, that the
12 Complainant has failed to sustain his burden of
13 proof by the requisite preponderance. And,
14 therefore, I will direct that the Amended Order
15 of Revocation, the Complaint herein, be set
16 aside and vacated.

17 IT IS ADJUDGED AND ORDERED THAT: the
18 Amended Order of Revocation, the Complaint
19 herein be, and the same hereby is set aside and
20 vacated.

21 Entered this 14th day of October,
22 1999, at Denver, Colorado.

23 

24 PATRICK G. GERAGHTY, JUDGE

25 *dated 11/8/99*

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1 Do you want the appeal provisions?

2 MR. HERNANDEZ: No, Your Honor, have
3 them.

4 JUDGE GERAGHTY: Anything else for
5 the record?

6 MR. WERNER: Thank you, Your Honor.

7 JUDGE GERAGHTY: No. Is there
8 anything else that you want in the record?

9 MR. WERNER: One in the record. I
10 would like to know what the provisions are for
11 making application for attorney fees and cost
12 based on the Court's ruling.

13 JUDGE GERAGHTY: Well, that's under
14 the Board's rules of A-26. You don't have --
15 they should have sent you a copy of that in
16 their acknowledgement of your appeal. If you
17 don't have one, if you'll call me at my office,
18 303-361-0615, I will send you a copy of -- you
19 essentially have 30 days after the decision is
20 final. This decision becomes final, in the
21 absence of appeal or expiration of 20 days
22 unless the Board elects to review upon its own
23 or there's a notice of appeal and appeal brief.
24 Then it's after the Board resolves it.

25 MR. WERNER: Thank you.

1 MR. HERNANDEZ: Your Honor, if I may,
2 I guess I spoke too soon. I'd like to proffer
3 Complainant's Exhibit No. 6, just for the
4 record.

5 JUDGE GERAGHTY: Well, no, the
6 record's closed. I'm not going to take
7 exhibits at this point.

8 MR. HERNANDEZ: I don't have anything
9 further, Judge.

10 JUDGE GERAGHTY: Nothing else for the
11 record. The proceeding is closed.

12 Thank you, gentlemen. Thank you for
13 the presentation.

14 (The hearing in the above-
15 entitled matter was closed.)
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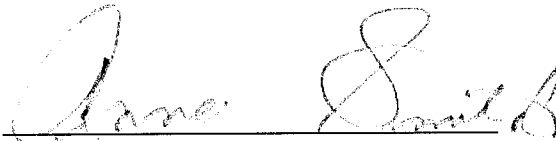
C E R T I F I C A T E

I, CHRIS ARGIE, do hereby certify that I appeared at the time and place first hereinbefore set forth; that I took down by means of cassette recording the entire proceedings had at said time and place; and that the foregoing pages three hundred and four through three hundred and forty one constitute a true, correct and complete transcript of my said cassette recordings.


REPORTER

CERTIFICATE OF SERVICE

This is to certify that a copy of the Oral Initial Decision and Order which was signed and edited on November 8, 1999, by the officiating Judge in this case, was mailed to the appropriate parties and/or their attorneys on this 15th day of November 1999.

A handwritten signature in cursive script, appearing to read "Anne Smith", written over a horizontal line.

**ANNE SMITH
Paralegal Spec./Hearings Asst.
Circuit III, PATRICK G. GERAGHTY
Administrative Law Judge
Denver, Colorado**

**MICHAEL J. KEATING
SE-15654**

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BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD

JANE F. GARVEY,)
ADMINISTRATOR,)
FEDERAL AVIATION ADMINISTRATION,)
Complainant,)
vs.) Docket Number
SE-15589
CORRINE N. LYON,)
Respondent.)
-----)

Federal Building
51 S.W. First Avenue
Tax Court Courtroom #1524
Miami, Florida

Friday,
October 15, 1999

The above-entitled matter came on for
hearing, pursuant to Notice, commencing at 9:30 a.m.

BEFORE:

HONORABLE WILLIAM A. POPE, II
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

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1 O R A L I N I T I A L D E C I S I O N

2 JUDGE POPE: On the record.

3 The following is my Oral Initial Decision in
4 the matter of the Administrator, Federal Aviation
5 Administration, Complainant, versus Corrine N. Lyon,
6 Respondent, Docket Number SE-15589.

7 This is a proceeding under the provisions of
8 49 U.S.C., Section 44709, formerly Section 609, of the
9 Federal Aviation Administration Act, and the provisions
10 of the Rules of Practice and Air Safety Proceedings of
11 the National Transportation Safety Board.

12 Corrine N. Lyon, the Respondent, has appealed
13 the Administrator's amended order of suspension dated
14 April 5, 1999, as amended on September 29, 1999 which,
15 pursuant to Section 821.31(a) of the Board's rules,
16 serves as the amended Complaint in which the
17 Administrator ordered the suspension of all airman's
18 certificates issued to the Respondent, including
19 commercial pilot certificate Number 140488386, for a
20 period of thirty days because of alleged violations of
21 Sections 91.13(a) or 91.13(b) of the Federal Aviation
22 regulations.

23 Unless requested to do so I will not read the
24 Complaint in this case.

25 (No response.)

1 JUDGE POPE: I hear no such request.

2 D I S C U S S I O N

3 JUDGE POPE: The basic facts in the case are not
4 in dispute. On about 8:30 a.m. on June 13, 1998 the
5 Respondent was taxiing N350KB, a Piper Navajo PA31-350
6 aircraft at the Fort Lauderdale airport from the north
7 side of the airport, where it was parked, to the Jet
8 Center ramp to position it for boarding passengers on a
9 charter flight scheduled for 10:00 a.m.

10 While heading west on the Jet Center ramp,
11 and in front of the Raytheon hangar, she made a 180
12 degree turn and continued a short distance until the
13 left wingtip of her aircraft hit the right nose of a
14 parked Piper twin engine aircraft, referred to as a
15 Chieftain, belonging to Dolphin Atlantic.

16 Respondent explained in her testimony that
17 she had seen the parked aircraft from her right window,
18 applied her right brake and right rudder in order to
19 turn her aircraft to the right and to position it
20 facing in the same direction as the chieftain.

21 She testified that she thought she saw
22 movement to the right as she was making the turn and
23 turned her head in that direction.

24 When she did she was suddenly blinded by
25 sunlight reflecting off the windshield of another

1 aircraft. She immediately endeavored to stop by
2 applying pressure on both brakes, but that momentarily
3 allowed her airplane to go forward a short distance,
4 and her left wingtip impacted the right nose of the
5 Chieftain.

6 The damage to Respondent's aircraft was
7 slight, a broken lens cover on the wing and a
8 fiberglass crack in the wing, but the damage to the
9 Chieftain was more extensive, consisting of piercing
10 the skin of the aircraft.

11 The cost of repairing the damage to the other
12 aircraft was about \$5,000. Respondent's airplane was
13 repaired and returned to service the same day.

14 There is no evidence to discredit her claim
15 that she was distracted by what she thought was
16 movement to her right and that her vision was impaired
17 by sunlight reflected in her eyes when she turned her
18 head. I find her to be a credible witness, and I will
19 credit her testimony to that effect.

20 There are two primary issues in this case.

21 First, was her operation of N350KB for the purpose
22 of air navigation within the meaning of Section
23 91.13(a)?

24 And second, considering all of the
25 circumstances, was her operation of N350KB resulting in

1 the collision careless?

2 Before considering these questions I would
3 like to briefly review several Board cases that are
4 relevant to the issues.

5 Board precedence clearly established that
6 taxiing an aircraft to a parking space is incident to
7 flight, Administrator v. Collins, 2 NTSB 1494, 1975.

8 In the same case the Board held that taxiing
9 an aircraft with restricted forward visibility without
10 taking any other measures to ascertain whether there
11 were any obstructions in front of them was careless
12 operation of the aircraft by the pilot, which was
13 sufficiently related to his actions as pilot to justify
14 suspension of his certificate.

15 In that case in which while taxiing the
16 Respondent collided with another aircraft, the Board
17 affirmed a suspension of five days.

18 In another case the Board held that simply
19 starting an unairworthy aircraft engine which then
20 caught fire was operating it within the meaning of
21 Section 91.9 and 91.10, now 91.13(a) and (b),
22 respectively, the latter applying to operation for
23 purposes other than air navigation. Administrator v.
24 Daily, 3 NTSB 1319, 1978.

25 Citing Administrator v. Pauly, P-a-u-l-y,

1 EA-690, 1975, the Board said where starting the
2 aircraft was preparatory to flight it was for the
3 purpose of air navigation.

4 In the Daily case, a suspension of thirty
5 days was affirmed.

6 In another case, Administrator v. Agans,
7 A-g-a-n-s, NTSB Order EA-3630, 1992, the Board affirmed
8 a fifteen day suspension where the wingtip of
9 Respondent's aircraft, while it was taxiing, struck the
10 nose of a parked aircraft.

11 The Board said that the fifteen day
12 suspension was at the low end of the range of sanctions
13 imposed for 91.9 violations of a similar nature and was
14 not unreasonable.

15 A suspension of the same duration was
16 approved in Administrator v. Chaffey, 3 NTSB 2140,
17 1979, a case in which the Respondent taxied without a
18 wingwalker and the wingtip of his aircraft struck
19 another aircraft.

20 The Board also affirmed a fifteen day
21 suspension for careless operation in Administrator v.
22 Hale, 3 NTSB 1855, 1979, a case in which the wing of
23 the Respondent's taxiing aircraft passed over the wing
24 of a parked aircraft and the other wing passed over a
25 push tractor.

1 The Respondent did not have a wingwalker to
2 assure clearance on either side, and that constituted
3 careless operation. The Board there affirmed a fifteen
4 day suspension.

5 The Board held in Administrator v. Gerston,
6 EA-4090, 1994, that the amount of damage caused by the
7 Respondent's wingtip striking the nose of a parked
8 aircraft while the Respondent was taxiing was not
9 exonerating or even mitigating.

10 In that case a thirty day suspension was
11 affirmed.

12 In a case in which the Respondent hand
13 propped an aircraft without taking appropriate safety
14 precautions and the aircraft moved forward under its
15 own power resulting in a collision with an automobile
16 in a hangar, the Board affirmed a violation of Section
17 91.10, now 91.13(b), and affirmed a ninety day
18 suspension.

19 The Board noted in that case, which is
20 significant here, that in determining if a specific act
21 or omission is prescribed by a general regulation, such
22 as 91.10, custom, practice and standard operating
23 procedure can be considered.

24 A similar result was reached in Administrator
25 v. Fisher, EA-3559, 1992, a case in which the

1 Respondent operated an aircraft after a hydraulic brake
2 failure depending upon his emergency brake, which did
3 not last as long as he expected. The Board
4 held that was careless under the circumstances, even
5 though not specifically prohibited by the aircraft
6 flight manual and other manuals in training.

7 The Board said that the Respondent's decision
8 was not reasonable because no safety considerations
9 required him to continue taxiing after the hydraulic
10 brake failure, and nothing in the company manuals or
11 training led him to believe that he was using the
12 emergency brakes in an authorized manner. A thirty day
13 suspension was affirmed in that case.

14 Now as to the question of whether the taxiing
15 of N350KB at the time at issue in this case was an
16 operation conducted for the purpose of air navigation,
17 I find that the relevant factor is that the Respondent
18 was to be the pilot-in-command of a Part 135 charter
19 flight and that she was taxiing the aircraft to the Jet
20 Center ramp at the Fort Lauderdale airport where she
21 expected to meet her passengers in approximately one
22 and one-half hours, more or less, and take them on
23 board her aircraft for a charter flight.

24 I find nothing to indicate that only taxiing
25 immediately before or after flight can qualify as an

1 operation for the purpose of air navigation.

2 The more appropriate criteria is whether the
3 taxiing operation was incident to flight for air
4 navigation and necessarily and directly connected with
5 flight or air navigation.

6 It is evident here that the taxiing operation
7 being conducted by the Respondent at the time of the
8 collision was incident to, necessary to, preparatory
9 to, and directly connected to the planned flight one
10 and one-half to two hours later. She was
11 taking the aircraft to where her charter passengers
12 were to board it, and that clearly meets all of these
13 criteria.

14 I find no merit to a contention that because
15 there was to be an intervening stop of a short duration
16 the ^{link}length between air navigation and the taxi
17 operation was severed.

18 Here the pause was to be no longer than it
19 took to board the passengers at the appointed time and
20 complete whatever administrative processing was
21 required.

22 Neither do I find that the fact that the
23 expected passengers did not show up severed the link.

24 At the time of the taxiing maneuver the
25 Respondent expected her passengers to arrive and she

1 expected to transport them in air navigation to
2 wherever their destination was.

3 At the time of the collision the taxiing
4 operation was directly incident to and preparatory to
5 planned air navigation, and that is sufficient to bring
6 the taxiing operation within the scope of Section
7 91.13(a).

8 The next issue to be considered is whether
9 the Respondent's taxiing operation was careless when
10 all of the surrounding circumstances are taken into
11 consideration.

12 Here it must be noted that the area around
13 the Jet Center was a very congested place, crowded with
14 parked aircraft and aircraft arriving and leaving.

15 The Jet Center itself was the arrival and
16 departure terminal for charter operations at the Fort
17 Lauderdale airport.

18 In addition to arriving and departing flights
19 aircraft were regularly parked in front or nearby until
20 they were put into use.

21 Also, there was a large maintenance facility
22 adjacent to the Jet Center which parked its customer's
23 aircraft in the same apron area until they were
24 serviced.

25 These conditions were well known to the

1 Respondent who, for more than a year, had operated
2 charter flights from the Jet Center and, by her
3 testimony, had made as many as seventy such flights.

4 Thus it came as no surprise to her that the apron
5 in front of the Jet Center was congested with aircraft
6 on the day in question.

7 There is no specific regulation which covers
8 taxiing an aircraft in a crowded or congested area.

9 Therefore, we must look to custom, practice
10 and standing operating procedures that a pilot of
11 Respondent's qualifications and experience should be
12 aware of.

13 She holds a commercial pilot's certificate, a
14 Part 135 certificate and is a flight and ground
15 instructor with over 5,000 flight hours.

16 The flight training handbook, AC 1-21(a),
17 with which Respondent is admittedly familiar states
18 that, "while taxiing the pilot must be sure the
19 airplane's wings will clear all obstructions and other
20 aircraft.

21 If at any time there is doubt about the
22 clearance of the wingtips, the pilot should stop the
23 airplane and have someone check the amount of clearance
24 from the object.

25 If no help is available, the engine should be

1 shut down. It may be necessary to have the aircraft
2 physically moved by a ground crew."

3 Here it is clear that the Respondent
4 attempted to taxi her aircraft into an area which was
5 already congested with parked aircraft and where there
6 was little room for clearance and no room for error.

7 Under these conditions, since her attention
8 could not be everywhere at one time and there might be
9 movement of aircraft or persons in any direction, the
10 prudent course of action would've been for her to
11 enlist the services of someone on the ground to check
12 for obstructions and clearance; such person being
13 referred to by some as a "wingwalker."

14 Instead the Respondent elected to proceed on her
15 own with no assistance from lookouts or wingwalkers,
16 and when her attention was momentarily distracted by
17 what she thought was movement to her right, then sun
18 glare when she looked in that direction, she lost
19 control of her aircraft and the left wingtip of the
20 aircraft hit the right side of the nose of the aircraft
21 she knew was close by on her left side.

22 When she turned her head in the direction of
23 what she perceived to be movement, she was obviously no
24 longer looking forward or to the left where her
25 aircraft was headed.

1 I further find there was no compelling
2 reasons for her attempting to park so close to the
3 other aircraft or to the Jet Center.

4 She could have parked her aircraft further
5 from the Jet Center in a less crowded area which
6 would've had no more of a consequence than requiring
7 her passengers to walk a somewhat longer distance to
8 get to the aircraft.

9 She put herself in the position of trying to
10 maneuver her aircraft in congested conditions without
11 assistance from a lookout solely as a matter of
12 convenience and not necessity.

13 Considering all of these circumstances I find
14 the Respondent's operation of N350KB was careless and
15 in disregard of the foreseeable possibility that her
16 attention might be distracted from the movement of her
17 own aircraft for any number of reasons, such as
18 movement of persons or other aircraft on the ground.

19 I find, therefore, that she did not take the
20 appropriate safety precautions to ensure the safe
21 movement of her aircraft, and that in failing to take
22 appropriate safety precautions she violated Section
23 91.13(a) by operating her aircraft in a careless manner
24 so as to endanger the life or property of another.

25 The remaining issue is what sanction is

1 appropriate under the facts and circumstances of this
2 case.

3 The Administrator seeks a suspension of
4 thirty days, which is the minimum suspension for
5 collision while taxiing under the Administrator's
6 enforcement sanction guidance table.

7 As I have already noted, however, there is
8 Board precedent for affirming sanctions of less than
9 thirty days in unaggravated cases which are similar
10 factually to this case.

11 These include Administrator v. Agans,
12 Administrator v. Chaffey, and Administrator v. Hale.

13 The Board has said that in cases of the wingtip of
14 a taxiing aircraft striking the nose of a parked
15 aircraft a suspension of fifteen days, while at the low
16 end of the range for sanction imposed for violations of
17 a similar nature, was not unreasonable.

18 The Board's sanction guidance table
19 recognizes that sanctions below the normal range may be
20 appropriate based on considerations of mitigation and
21 that factors such as the nature of the violation,
22 inadvertent or deliberate, and attitude of the violator
23 can be considered.

24 Here I find that the Respondent's violation
25 was entirely inadvertent and resulted from placing

1 herself in a position where she could not alone pay
2 attention to obstacles or movement coming from all
3 directions at one time.

4 Further, I find ample evidence that she is a
5 capable pilot who is safety conscious and has a good
6 compliance attitude.

7 For this one lapse of carelessness I find
8 that, consistent with Board precedence, a suspension of
9 her airman's certificates for fifteen days is
10 appropriate to both the offense and the offender.

11 Upon consideration of all of the substantial,
12 reliable and probative evidence of record, I find the
13 Administrator has proven by a preponderance of the
14 evidence only so much of the Complaint as alleges that
15 the Respondent violated FAR Section 91.13(a) and that
16 the alleged violation of Section 91.13(b), having been
17 dismissed.

18 I further find it appropriate to modify the
19 Administrator's Order with respect to the sanction by
20 reducing the period of suspension from thirty days to
21 fifteen days.

22 O R D E R

23 Accordingly, it is ordered:

24 One, the Respondent's appeal is granted in
25 part and denied in part;

1 Two, the Administrator's Order shall be
2 modified to provide that the Respondent violated FAR
3 Section 91.13(a) and all other alleged violations of
4 the Federal Aviation regulations are dismissed; and

5 Three, the Administrator's Order shall be
6 modified with respect to sanction to provide for
7 suspension of any and all airman's certificates held by
8 the Respondent, including her commercial pilot's
9 certificate Number 140488386, for a period of fifteen
10 days.

11 A P P E A L

12 JUDGE POPE: I have here reduced the
13 appellate rights of the parties to writing, and I shall
14 mark one copy as ALJ Exhibit 1.

15 (Whereupon, the document above referred
16 to was marked for identification as ALJ Exhibit 1 and
17 was received into evidence.)

18 JUDGE POPE: And I'll hand it to the Reporter
19 for inclusion into the record.

20 And if Counsel will come forward I'll give
21 each of you a copy.

22 I will be glad to read the appellate rights
23 of the parties into the record if I am so requested.

24 Ms. Rich, do you want me to do so?

25 MS. RICH: No.

1 JUDGE POPE: Mr. McDonald?

2 MR. McDONALD: No thank you, your Honor.

3 I'm real familiar with them and I will
4 explain them to my client. I already have briefly.

5 JUDGE POPE: All right.

6 Is there anything further to come before me
7 in connection with this by the Administrator?

8 MS. RICH: No.

9 JUDGE POPE: By the Respondent?

10 MR. McDONALD: No thank you, your Honor.

11 JUDGE POPE: Very well. The record is
12 closed.

13 (Whereupon, at 4:55 p.m.,

14 the hearing in the above-

15 entitled matter was closed.)

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Edited
Vivian L. Pope, Jr.
Judge
11/10/55

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FEDERAL AVIATION ADMINISTRATION

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In the matter of: :

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:

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JANE F. GARVEY, :

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ADMINISTRATOR, :

7

FEDERAL AVIATION ADMINISTRATION, :

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:

9

Complainant, : Docket SE-15668

10

v. :

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:

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JOSEPH J. BENNIE :

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:

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Respondent. :

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- - - - - x

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U.S. Bankruptcy Court

17

Honolulu, HI 96813

18

Sixth Floor

19

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Friday, October 29, 1999

21

ORAL DECISION AND ORDER

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 WASHINGTON, D.C.
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PEARANCES:

2

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1 ADMINISTRATIVE JUDGE POPE: The following is my
2 oral initial decision in the matter of the Administrator,
3 Federal Aviation Administration, Complainant, versus Joseph
4 J. Bennie, Respondent, Docket number SE-15668.

5 This is a proceeding under the provisions of
6 49 USC Section 44709, formerly Section 609 of the Federal
7 Aviation Act and the provisions of the Rules of Practice in
8 air safety proceedings of the National Transportation Safety
9 Board.

10 Joseph J. Bennie, the Respondent, has appealed
11 the Administrator's Order of Suspension dated June 8, 1999
12 which pursuant to Section 821.31(a) of the Board's rules
13 serves as the complaint, in which the Administrator ordered
14 the suspension of his airline transport pilot's certificate
15 number 001900672 and any other airman pilot certificates
16 held by him for a period of 30 days because of alleged
17 violations of Sections 135.87 C(1) and 91.13(a) of the
18 Federal Aviation Regulations.

19 Unless requested to do so, I will not read the
20 complaint into the record. I see no such request.

21 This case almost entirely turns on credibility
22 issues and interpretation of observations by the witnesses.
23 The evidence establishes that the Respondent was the single
24 pilot operator of a Part 135 cargo flight by TransAir of
25 Hawaii, a Part 135 carrier on November 21, 1998 from Kamuela

1 airport on the island of Hawaii destined for Honolulu,
2 Hawaii.

3 Accompanying the Respondent on one flight was a
4 loader named Van Ezell, who, although a pilot himself, at
5 that time was employed by TransAir as a loader. Respondent
6 arrived at the Kamuela airport at about 4 p.m. in an empty
7 aircraft for the purpose of loading cargo consisting mostly
8 of U.S. mail for transportation to Honolulu. Some portion
9 of the mail taken on board had to arrive at the Honolulu
10 Post Office by six p.m. He ultimately departed the airport
11 at about 4:30 p.m. on a flight to Honolulu that typically
12 took about 52 minutes.

13 Upon arriving at the Kamuela airport at about 4
14 p.m., the TransAir station manager, Tom Hesketh, drove a
15 truck to the airport and backed it up to the cargo door
16 behind the left wing of the aircraft for the purpose of
17 transferring cargo to the aircraft. On the ground for the
18 cargo transference was the loader, Van Ezell. In the cargo
19 compartment behind the pilot seats was the Respondent.

20 The process for loading was for Hesketh to hand
21 sacks of mail or other cargo to Ezell, who handed them up to
22 the Respondent who placed them in the cargo compartment. To
23 balance the aircraft, after partially loading the cargo
24 compartment, the nose compartment was loaded, then loading
25 of the cargo compartment was concluded.

1 TransAir's operations manual requires that cargo
2 be properly secured to prevent shifting, regardless of
3 whether or not passengers are on board. FAR Section 135.87
4 C(1) provides that no person may carry cargo in an aircraft
5 unless it is properly secured by a safety belt or other
6 tiedown having enough strength to eliminate the possibility
7 of shifting under all normally anticipated flight and ground
8 conditions.

9 The method of cargo restraint in Respondent's
10 aircraft, a twin engine Cessna 402, was a cargo net attached
11 behind the pilot's seats to the floor, which was to be
12 stretched over the cargo and fastened to the rear of the
13 cargo compartment by straps which could be tightened to
14 provide tension.

15 The Administrator contends that Respondent took
16 off without the cargo net in place over the cargo and
17 strapped down. The Administrator's case with respect to
18 this issue rests on the testimony of Aviation Safety
19 Inspector (air worthiness) Robert S. Christiansen, who was
20 at the Kamuela airport for the purpose of surveilling the
21 repair of a helicopter.

22 He noticed the truck parked near the rear door of
23 the Respondent's aircraft and walked up beside it and
24 noticed the cabin was partially filled with mail bags up to
25 the level of about the windows, except on one side where

1 they partially obscured the windows. He saw that the cargo
2 was not secured because the net was draped behind and
3 underneath the mailbags.

4 After the rear doors were closed and the pilot
5 entered the aircraft through the cockpit door of the left
6 wing, with the other pilot already in and seated in the left
7 seat, Respondent climbed up on the -- Inspector Christiansen
8 climbed up on the wing. He stated that he asked the pilot
9 who had just ordered -- that he asked the pilot who had just
10 boarded where the handhold was before climbing on the wing.
11 He said the pilot door was still open and through it he
12 first said he was surprised that they were working on
13 Saturday and identified himself as an aviation safety
14 inspector.

15 Then he said he was performing a ramp inspection.
16 The weather was windy and cold, and he did not want to
17 perform the inspection outside the aircraft for fear of the
18 papers would be blown away. After determining the
19 certificates provided by the occupants were in order, he
20 told the pilots that if the cargo needed to be secured, they
21 should secure it before they left. The Complainant alleges
22 that he said that if the cargo needs to be secured, you
23 should do it before take off.

24 He then got down from the aircraft and went
25 inside the terminal and saw both pilots get out. The pilot

1 proceeded to the rear cargo door, - opened the top half,
2 looked in, but did nothing, then closed it and got back in
3 the aircraft. Inspector Christiansen could still see the
4 bags visible in the rear window in the same position. The
5 engines of the aircraft were started and it departed.

6 In contrast to Inspector Christiansen's
7 testimony, Robert Hesketh, the station manager, Van Ezell,
8 the loader, and the Respondent all testified that as the
9 rear cargo compartment was loaded to the ceiling, the net
10 was pulled back over the cargo and when loading was
11 completed the rear net straps were fastened to the hooks on
12 the floor, and the straps were tightened.

13 They all testified that the aircraft had in place
14 inside the cargo compartment, plastic cabin liners to
15 protect the aircraft's upholstery and the aircraft windows
16 from the cargo. This liner covered the windows partially
17 and blocked the view from the pilot's compartment into the
18 cargo compartment, or at least restricted it.

19 Respondent testified that he was seated in the
20 right seat, and Ezell, the loader, said he was seated in the
21 left seat. Respondent agreed that he was pilot-in-command.
22 Both Respondent and Ezell stated that Inspector Christiansen
23 only said that they might want to check cargo. Both
24 Respondent and Ezell got out of the aircraft after Inspector
25 Christiansen got off the wing and left, and Respondent

1 looked at the cargo in the nose section, while Van Ezell
2 opened the top half of the rear cargo door and saw that the
3 net was in place. Respondent does not claim that he looked
4 in the rear cargo compartment at this time.

5 In February 1999, ASI, Aviation Safety Inspector
6 Steven Dahlen took photographs of the same aircraft with
7 cargo stacked as Inspector Christiansen said he saw it and
8 as the Respondent and his two witnesses said they saw it.
9 The aircraft was also photographed with and without cabin
10 liner in place.

11 I've had the opportunity to observe the testimony
12 of Inspector Christiansen, and the three percipient
13 witnesses called by the Respondent: the Respondent himself,
14 Van Ezell and Tom Hesketh. Inspector Christiansen gave the
15 appearance of being forthright in his testimony. I do not
16 discern any motive on his part to be untruthful. He was not
17 there for the purpose of performing a ramp inspection on
18 this aircraft and I find his explanation that he only
19 performed it because he saw unsecured cargo to be
20 believable, especially as he performed it out of doors, on
21 the wing of the airplane, in very uncomfortable weather
22 conditions. Further, he has no apparent interest in the
23 outcome of the case and there is no evidence that he ever
24 met either Respondent or Van Ezell or the station manager
25 before, or that he has any personal motive for testifying

1 falsely.

2 I further find, however, that Respondent's
3 witnesses gave the appearance of being truthful witnesses
4 also. But they do all work for TransAir, the carrier, and
5 Respondent has the obvious motive of his self-interest in
6 denying the charges against him. Thus I find that they are
7 not disinterested witnesses and do have an interest in the
8 outcome of the case.

9 Tending to support their credibility are the
10 circumstances of the ramp inspection. Inspector
11 Christiansen did not tell them that he had seen the cargo
12 net was not in place. He only said that if the cargo needed
13 to be secured, they should do it before take off. It is
14 puzzling why he would not have told them precisely what he
15 thought was wrong so that they would be on notice of the
16 alleged defect and have an opportunity to specifically
17 correct it. Instead his statement was vague and non-
18 specific.

19 Even so, the pilot and the loader got out of the
20 aircraft and while the pilot looked in the nose compartment,
21 the loader looked in the rear cargo area. At that point, if
22 something as obvious as the cargo net not being in place
23 existed, it is a logical conclusion that the loader would
24 have told the pilot and that they would have corrected the
25 situation, which would not appear to have been a major

1 undertaking in terms of complexity and time.

2 Here I also note that the Respondent had a
3 cushion of time which would allow him to make the correction
4 without being late in Honolulu in getting the mail to the
5 Post Office.

6 It is not clear from the evidence that Inspector
7 Christiansen was in a position to see the final stages of
8 loading the aircraft and closing the cargo doors. He made
9 no mention of seeing the loader on the ground and the
10 partial loading of the rear cargo by the Respondent who then
11 got out and loaded the nose compartment before returning to
12 finish the loading of the rear cargo area. The Inspector,
13 who said he was standing by the truck in very uncomfortable
14 weather conditions, does not appear to have been in a
15 position to have observed every aspect of the loading, and
16 simply may not have seen the strapping down of the cargo net
17 at the last step -- as the last step before the cargo door
18 was closed, which Hesketh and the Respondent say they
19 performed from inside the cargo compartment.

20 As to whether or not the liner was in place, the
21 conditions in the reconstructed photos have not been shown
22 to represent accurately the condition of the aircraft at the
23 time of the alleged incident. They were a simulation
24 created by the Administrator's inspectors several months
25 after the fact and no evidence was introduced that the

1 Respondent and his witnesses agreed that they accurately
2 portrayed the condition of the aircraft at the time of the
3 incident, other than hearsay testimony.

4 The accuracy of the portrayal of the cargo load
5 is also the question as even the Administrator's witness
6 acknowledged that the cargo in the photographs was not the
7 same as at the time of the incident.

8 Finally, Inspector Christiansen said that he had
9 a clear view of the cargo compartment while he was
10 conducting the ramp inspection. That is not necessarily
11 inconsistent with the photograph introduced in evidence from
12 which it cannot be accurately determined how much of the
13 cargo is visible over the liner because the photograph is
14 dark, and especially with both pilot seats being occupied.
15 Also unproven by the photographs is whether or not the tops
16 of the mail bags may have been visible above the liner
17 through the rear window from the distance of the terminal.

18 On balance, I conclude that all of the witnesses
19 testifying testified to the best of their recollection,
20 based upon their observations at the time. I do not find
21 that Inspector Christiansen is an untruthful witness. But I
22 have considerable doubt that he was able to observe the
23 final stages of the loading process from his vantage point,
24 and considering the discomfort resulting from the cold,
25 windy weather.

1 I also find that the Respondent and his
2 witnesses were truthful in their testimony, but the
3 difference is that they had a better opportunity to have
4 seen whether the cargo was secured at the time the cargo
5 door was closed.

6 There is, of course, no way to conclusively
7 resolve whose testimony is the more truthful or the more
8 accurate. The burden is on the Administrator to prove the
9 alleged violation by a preponderance of the evidence. One
10 definition of the preponderance of the evidence is that the
11 Administrator must have shown that it is more probable than
12 not that the violations occurred. I cannot make that
13 finding in this case.

14 Therefore, I conclude that the Administrator has
15 failed to prove the alleged violations of the Federal
16 Aviation Regulations and the complaint must be dismissed.

17 Upon consideration of all the evidence of record,
18 I find that a preponderance of the evidence -- substantial,
19 reliable and probative evidence of record does not establish
20 that Respondent violated FAR Sections 135.87 C(1) and
21 97.113(a) as alleged in the complaint, and that safety in
22 air commerce and air transportation and the public interest
23 do not require affirmation of the Administrator's Order of
24 Suspension.

1 Accordingly, it is ordered that:

2 One, that Respondent's appeal is granted;

3 Two, the Administrator's Order of Suspension is
4 reversed;

5 Three, the complaint is dismissed.

6 Is there anything further to come before me in
7 connection with this case by the Administrator?

8 MR. LAWSON: Nothing further.

9 ADMINISTRATIVE JUDGE POPE: By the Respondent?

10 MR. FERRARA: Nothing, Your Honor.

11 ADMINISTRATIVE JUDGE POPE: The record is closed.

*Reviewed 12/1/99
William E. Pope, II
Judge*

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REPORTER'S CERTIFICATE

This is to certify that the attached
proceedings before: NTSB

In the Matter of: HONOLULU HEARINGS

were held as herein appears and that this is the
original transcript thereof for the file of the
Department, Commission, Administrative Law Judge
or the Agency.

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Official Reporter

Dated: OCTOBER, 1999

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